United States Court of Appeals
for the Fourth Circuit

No. 80-1496

Cornelius M. Whalen t/a Towson Associates Limited Partnership, to its own use and to the use of Robert Whalen Company, Inc.,

Appellee,

v.

Ford Motor Credit Company, a body Corporate,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Herbert F. Murray, District Judge.

Argued March 29, 1982 *Decided June 30, 1982*

Before WINTER, Chief Judge, BUTZNER, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN and CHAPMAN, Circuit Judges, sitting en banc.

Paul V. Niemeyer (Jeffrey D. Herschman, William L. Marbury, Piper & Marbury on brief) for Appellant; David Freishtat (Michael L. Schwartz, Freishtat, Schwartz & Sandler on brief) for Appellee.

MURNAGHAN, Circuit Judge, with whom Russell, Widener, Ervin and Chapman, Circuit Judges, join:

Jurisdiction here depends on diversity. Suit was instituted on December 10, 1975. Trial by jury commenced on March 31, 1980 in the United States District Court for the District of Maryland, with Judge C. Stanley Blair presiding. The case grew out of the refusal by Ford Motor Credit Company ("Ford Credit") to close with Towson Associates Limited Partnership ("Towson") (or more precisely, the

provider of interim financing, Equibank N.A. ("Equibank")), under a loan commitment to make available take-out financing for a twenty-seven[1] floor apartment and office building complex, provided certain terms and conditions were satisfied. Compliance by Towson with the terms and conditions was required to have been achieved by September 2, 1975.[2]

The case was complicated by a number of issues, including (a) whether Towson met the completion requirement, (b) whether an assignment by Towson to Equibank of its interests under the take-out commitment with Ford Credit was absolute, and (c) whether rulings on the admissibility of evidence and the phraseology of instructions related to damages and their methods of calculation were correct.

After the taking of three weeks of testimony, Judge Blair on April 20, 1980 tragically and suddenly died.[3] Ford Credit, on the grounds of Judge Blair's death, moved for a mistrial, citing F.R. Civ. P. 63. The Rule, entitled "Disability of a Judge," provides for substitution of a new judge for the one disabled by death or other disability when the disability occurs "after a verdict is returned or findings of fact and conclusions of law are filed."

Judge Herbert F. Murray, who had taken Judge Blair's place, considered and denied the motion for mistrial, reasoning that it would be "inconceivable" to hold substitution over the objection of a party of a new judge before

[1] Twenty-seven floors contained condominium units. An upper deck conceived of as a community room perched on top of everything, but apparently did not contain any marketable units. Descrption as a twenty-seven or twenty-eight floor building would be appropriate. We shall consider the building as comprised, for the purposes which concern us, of twenty-seven floors.

[2] The date actually specified in the documents was September 1, 1975, which in that year coincided with Labor Day.

[3] Subsequently, Judge Herbert F. Murray, as a substitute for Judge Blair, took two weeks more of testimony before the jury retired and returned a verdict in favor of Towson.

return of verdict absolutely forbidden in a civil action when Rule 25(a) of the Federal Rules of Criminal Procedure explicitly permits such a substitution in a criminal setting.[4] In effect, Judge Murray treated the question of whether to substitute a new judge and continue the trial as a matter committed to the new trial judge's discretion, and no doubt perceived force in the argument that the rule was literally silent as to what should happen in a civil case where disability occurs *before* a verdict is returned or findings of fact and conclusions of law are filed.

Judge Murray dealt with a number of civil cases arising in a non-jury trial setting which found substitution before filing of findings of fact and conclusions of law absolutely forbidden, purporting to distinguish them on the grounds that non-jury cases raise "more serious due process issues than if such replacement occurs during a jury trial." *Arrow-Hart, Inc. v. Phillip Carey Co.*, 552 F.2d 711 (6th Cir. 1977); *Brennan v. Grisso*, 198 F.2d 532 (D.C. Cir. 1952); *Ten-O-Win Amusement Co. v. Casino Theatre*, 2 F.R.D. 242 (N.D. Calif. 1942); *Burrill v. Shaughnessy*, 9 Fed. R. Serv. 918 (N.D. N.Y. 1946).

We conclude, for the following reasons, that retrial was mandated by the rule, and that consequently there must be a reversal and return of the case to the district court for a new trial:

1) The basis for a distinction of non-jury cases from jury cases does not appear to exist for Rule 63 does not differ in what it provides for both types of trials. On the contrary, it clearly calls for like treatment: "after a verdict is returned

[4] Professor Charles Wright (who served as an assistant to the Reporter for the Advisory Committee on the Civil Rules) has expressed the belief that constitutional obstacles stand in the way of application of Rule 25(a) over the objection of the defendant. 2 Wright & Miller, *Federal Practice and Procedure: Criminal* § 392. We have no occasion here to investigate that possibly thorny question.

or findings of fact and conclusions of law are filed."[5] In addition to cases cited by Judge Murray, *see: Bromberg v. Moul*, 275 F.2d 574 (2d Cir. 1960); *Havey v. Kropp*, 458 F.2d 1054 (6th Cir. 1972); *State ex rel. Lunsford v. Weber*, 153 W. Va. 544, 547-48, 170 S.E.2d 671, 673 (1969); *Girard Trust Bank v. Easton*, 12 N.C. App. 153, 182 S.E.2d 645 (1971), *cert. denied*, 279 N.C. 393, 183 S.E.2d 245 (1971).[6]

2) The supposition is unrealistic that the distinguished group of legal scholars who, as the Advisory Committee on

[5] In an effort to escape the consequences of that telling argument, the dissent proposes that Rule 63 is as inapplicable to judge trials as it is to jury trials where the death of the judge has occurred *before* the return of verdict or the filing of findings of fact and conclusions of law. For both it contends that the rule is silent, and, therefore, not involved. The disregard of precedent in that approach is substantial. The courts have uniformly accepted the applicability of Rule 63 to the cases where death of the judge came before filing of findings and conclusions. *E.g., Arrow-Hart, Inc. v. Philip Carey Co.*, 552 F.2d 711 (6th Cir. 1977) (". . . we hold that a new trial is required and that Judge Siler was correct in his construction of Rule 63."); *Ten-O-Win Amusement Co. v. Casino Theatre*, 2 F.R.D. 242 (N.D. Calif. 1942) ("The language of the rule [Rule 63] seems clear. . . . As findings of fact and conclusions of law herein were not 'filed' by Judge LOUDERBACK before his death, I have no power to sign and file them now. A new trial will be therefore granted as to defendant Donohue.").

The dissent, accordingly, suggests a rationale for such cases not only distinct from, but in direct conflict with, the reasoning actually employed by them.

[6] The dissent suggests that state court authorities are inappropriate precedent "for the Federal Rules of Civil Procedure were adopted to end conformity with state procedures." The suggestion overlooks, however, that, after the Federal Rules of Civil Procedure were adopted, the states themselves moved to bring themselves into conformity with federal procedures. Thus the state decisions cited *State ex rel. Lunsford v. Weber*, 153 W. Va. 544, 170 S.E.2d 671 (1969) and *Girard Trust Bank v. Easton*, 12 N.C. App. 153, 182 S.E.2 645 (1971), *cert. denied*, 279 N.C. 393, 183 S.E.2d 245 (1971) were decided under state rules of civil procedure which had adopted *in haec verba* the Rule 63 language of the Federal Rules of Civil Procedure. *See* 1 West Virginia Code Appx. Rule 63; 1A General Statutes of North Carolina (1969 Replacement Volume) § 1A-1, Rule 63.

the Civil Rules, prepared the Rules for approval and adoption by the United States Supreme Court meant, by their silence, to permit the possibility of substitution of a judge before verdict when Rule 63 entitled "Disability of a Judge" expressly deals only with substitution of a judge *after* return of verdict. Inherent in the ascription of such a *sub silentio* purpose would necessarily be establishment that there had been prior practice in which substitution of a judge after trial began but before return of verdict customarily had been allowed over the objection of one of the parties.

But the experience had all been the other way. Research has failed to turn up a single case of substitution before verdict where one of the parties refused to consent. *Cf. Substitution of Judge in Criminal Case*, 83 A.L.R.2d 1032, 1034, 1036 (1962) ("A substitution of judges during the introduction of evidence, over the objection of the accused, has been held to be error."); *Coleshill v. Manchester Corp.*, [1928] 1 K.B. 785 (Scrutton, J.: "I doubt whether a judge has any jurisdiction to continue the hearing of a case in which witnesses have been called in court in the course of the trial before the jury and another judge. . . .").[7]

[7] The dissent seeks to denigrate the observation of Scrutton, J. in *Coleshill v. Manchester Corp.* on the basis that, despite a doubt expressed on jurisdictional grounds, the Court in *Coleshill* nevertheless reviewed the appeal on the merits. The dissent fails, however, to allude to the most pertinent consideration that the trial below had continued before a substituted judge "at the urgent request of the parties." Hence, no point was preserved, or presented, on appeal. It would have required something bordering on effrontery for the judge to have frustrated the earnest desire of both parties to obtain a result. However, had, as here, one of the parties objected to continuation before a substituted judge and demanded a trial *de novo*, there is no doubt that Scrutton, J., regarding the result as dictated by English law, would have accommodated him.

St. Louis Southwestern Ry. v. Henwood, 157 F.2d 337 (8th Cir. 1946), *cert. denied*, 330 U.S. 836 (1947), *rehearing denied*, 331 U.S. 870 (1947) has no pertinence. It was not a jury case, and, indeed, as a bankruptcy case, did not even arise under F. R. Civ. P. 63. *In re Schoenfield*, 608 F.2d 930, 933 (2d Cir. 1979P; F. R. Civ. P. 81(a)(1)). Indeed, *St. Louis Southwestern Ry. v. Henwood*,

3) Furthermore, we need not merely rationalize as to the intent of the Advisory Committee on the Civil Rules. The records of their proceedings make crystal clear their intentions.[8] After the Civil Rules were adopted in 1938, the Committee continued its existence to monitor their application and to consider possible revisions. On May 20, 1953 the Committee met, including as members continuously having served since its inception in 1935 the Chairman William D. Mitchell, the Reporter Charles E. Clark,[9] Armistead M. Dobie,[10] and Monte M. Lemann.

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supra, seems to say that, had the statutory predecessor to Rule 63 been applicable, the discretion to substitute a judge would have been foreclosed. *Id.* 157 F.2d at 342.

Where, as here, Rule 63 does apply: "The death . . . of a judge during a trial and before a verdict is returned in a jury case or before findings of fact and conclusions of law are made in a court case will, in the absence of consent of all parties, normally result in a mistrial." 6A Moore's *Federal Practice* (2d ed.) ¶ 59.08[2].

[8] The materials are fully accessible as a consequence of deposits by members of the Advisory Committee on the Civil Rules with several law schools with which they had affiliations: Charles E. Clark (Yale University), Edmund M. Morgan (Harvard University), Edgar B. Tolman (University of Chicago), and Monte M. Leman, (Tulane University).

The dissent argues that reliance on such materials is inappropriate. However, it should be appreciated that, at the panel level, the dissent demonstrated, at least to the author's satisfaction, why Rule 63 mandated a new trial. It did so without any reliance on such materials. The materials are primarily relevant in that they serve to remove completely any lingering doubt that, however logical and persuasive, the result might just possibly be contrary to what the Rules Committee actually intended.

As the dissent acknowledges, proceedings of the Rules Committee are "of great interest to scholars of the federal judicial system." In their almost daily resort to the authorities, federal judges are "scholars of the federal judicial system," as interested in making their decisions as accurate as possible as any professor of law.

[9] His distinguished career embraced, in addition, the deanship of the Yale Law School, and service as a judge of the United States Court of Appeals for the Second Circuit.

[10] A member of the Fourth Circuit Court of Appeals.

Responding to suggestions that death of a judge while a long lasting trial was in progress should not require a substitute judge to start the trial all over again, Judge Clark, as reporter, recommended as an addition to the language of Rule 63 the following:

> A judge so acting may receive in evidence a transcript of evidence theretofore taken in the case and may accept the testimony therein transcribed except so far as he shall find it necessary to hear witnesses whose credibility must be determined as a step in the adjudication.

"Reporter's Draft of Several Amendments, Federal Rules of Civil Procedure, May 11, 1953," at p. 9 (Charles E. Clark Papers, Yale University Library). The recommendation was fully explored:

> CHAIRMAN MITCHELL: [T]wo or three years ago . . . [w]e came to the conclusion that under the existing rule, the only way a judge could take up a case which has been tried by another judge but he hasn't decided it, is by stipulation. . . .
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> . . . .
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> Here is a case where the trial judge died and you have had a long transcript of testimony taken. He is dead, and there is no law or rule that allows another judge to take over the case on a transcript made by the preceding judge who is now dead. The only way it can be done now is by stipulation. If your adversary won't consent to that, you have to start your case all over again before another judge.
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> . . . .
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> MR. LEMANN: Apparently it never occurred to us that we ought to permit another judge to come in and act at all if the case had not reached the point of decision by the first judge.
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> CHAIRMAN MITCHELL: That is it.
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> . . . .
>
> MR. LEMANN: . . . It didn't occur to anybody, and hadn't for fifteen years except the one guy, that it isn't enough.

I wouldn't change the rule just because one guy writes a letter in and says this might happen and counsel might not stipulate. . . .

. . . .

MR. TOLMAN: Yes. It is a problem, and I know that the Judicial Conference has discussed this rule several times.

MR. LEMANN: They never have recommended a change, though.

MR. TOLMAN: That is quite true.

. . . .

CHAIRMAN MITCHELL: As I say, I have had a concrete case where the lawyers were very much distressed. They had gone through a long trial and a long record. The judge had died, and there was no relief under the statutes or rules which enabled a new judge to decide the case on the basis of the testimony taken by the dead judge.

I suggested they had better try getting a stipulation, and they succeeded in it.

. . . .

CHAIRMAN MITCHELL: But what happens when the plaintiff has made out a case and has gone through a long trial and then the judge dies, and he asks the defendant to consent to have another judge decide it on the basis of the old record, and the other side says no?

. . . .

MR. LEMANN: It breaks my heart by imagining a sufficiently hard case, but I don't think it is likely to happen. If I had one case in 15 or 20 years, it would have to be very hard to make me change the rule, I think.

JUDGE DRIVER: It seems to me we almost have to limit it to cases in which all or substantially all the testimony had been received. Otherwise, we would be compelling the plaintiff to go on the record of witnesses, and the defendant would have flesh-and-blood witnesses in the court ready to testify. If I were

the defendant, I wouldn't consent to that arrangement unless I had to.

. . . .

MR. LEMANN: Then we would have to rewrite Rule 63, because if you leave it as it is, as Mr. Mitchell pointed out, it restricts it to cases where a verdict has been returned or findings of fact and conclusions of law have been filed by the judge who had died. That is the way it reads now, and that is the way the statute from which it was copied read.

CHAIRMAN MITCHELL: That is right.

. . . .

CHAIRMAN MITCHELL: I think the amendment proposed is inadequate because it leaves in the provision that the rules don't apply at all unless the judge has made findings. That is aside from the mark. I have the feeling that maybe we had better leave it alone.

JUDGE DOBIE: I don't think it is vital. Let's pass it.

JUDGE CLARK: All right.

3 *Transcript of the Proceedings*, Meeting of the Advisory Committee on Federal Rules of Civil Procedure, May 18-20, 1953, at pp. 572-579 (May 20, 1953) (Charles E. Clark Papers, Yale University Library).

Charles E. Clark, as reporter necessarily the member most familiar with the rules, had earlier expressed the same view that death of the judge before verdict or filing of findings and conclusions necessitated a new trial absent a stipulation of the parties. Professor James William Moore, Judge Clark's colleague at Yale University, and a member of the Advisory Committee on the Civil Rules, who deservedly enjoys a reputation for knowing the rules, replied on November 1, 1938, on "behalf of Dean Clark and myself" to a suggestion that a whole new trial should not be required:

> . . . Dean Clark . . . and I feel that it [your case] is not within the literal meaning of the rule [Rule 63] and probably not within the rule even when given a liberal construction. You will note that the rule authorizes another judge to act "after a verdict is returned or findings of fact and conclusions of law are filed." . . .
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> . . . .
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> Although Rule 63 may work harshly in your case, I believe that its requirement that findings of fact and conclusions of law be filed as a condition to action by another judge is sound since in many cases, although a judge may indicate his general decision, there will be considerable dispute over the exact findings of fact to be made.

Letter from James William Moore to Douglas Arant, Esq. (November 1, 1938) (Charles E. Clark Papers, Yale University Library).

Again, in 1943, Charles E. Clark appended to Rule 63 a comment respecting a contemplated draft of revisions to the rules. He cited the case of *Ten-O-Win Amusement Co. v. Casino Theatre* 2 F.R.D. 242 (N.D. Calif. 1942), *supra*, where death interrupted a trial. He concluded: "In such a case, a new trial is necessary." Charles E. Clark, *Tentative Draft for Revision of the Rules and Comments Covering the Early Rules*, at p. 173 (Advisory Committee on Rules for Civil Procedure: January 16, 1943) (Charles E. Clark Papers, Yale University Library).

4) Resort to the contrasting developments of F. R. Civ. P. 63 and its counterpart, F. R. Crim. P. 25, only serves to confirm the conclusion that a new trial is mandated. F. R. Crim. P. 25, when first adopted, contained only what is now Rule 25(b). It was, consequently, in the district court's language, "virtually identical" to Rule 63. The Judicial Conference of the United States in 1963 approved a recommendation "that if a judge dies, becomes ill, or suffers other disability, by reason of which he is unable to continue the trial of a civil or criminal case, provision

should be made authorizing the substitution of another judge in the case." *Report of the Proceedings of the Judicial Conference of the United States* held at Washington, D.C., March 11-12, and September 17-18, 1963, pp. 70-71. The recommendation, which certainly proceeds on the premise that such substitution would not be possible without a rule change, was referred to the respective advisory committees for the civil and the criminal rules.

The criminal rules committee proceeded to fashion a proposed Rule 25(a), which was indeed subsequently adopted, permitting substitution of a judge "During trial." That in itself was an acknowledgment by a body knowledgeable about the Federal Rules that in its previous form (now Rule 25(b)), virtually identical with Civil Rule 63, Rule 25 did not permit substitution during trial. Furthermore, the Committee called particular attention to the point, repeating in several publications the following comment: "Notice that Civil Rule 63 is substantially similar to the present version of Criminal Rule 25 so that parallel consideration by the Civil Committee would seem appropriate." *See* Deskbooks of meetings of the Advisory Committee on Criminal Rules for January 1964 and October 1964 (Public Files, Library of the Administrative Office of the United States Courts, Washington, D.C.).

In face of its own earlier resolution of the issue and of the reiterated suggestion of its sister committee, the Advisory Committee on the Civil Rules took no action. It is difficult to come to any other decision than that the Committee was content to leave Rule 63 as it was, i.e., as still necessitating a trial *de novo* when the trial judge dies in the course of it, before verdict or the filing of findings and conclusions.[11]

[11] The suggestion that it was "inconceivable" that there should be a rule permitting judge substitution before verdict in criminal proceedings without a similar provision in the Civil Rules overlooks the special impact in the criminal area of double jeopardy considerations. For a criminal defendant, the amendment in 1966 to permit pre-verdict substitution of a judge allowed a case to go forward, at least when the criminal

5) Reference to the Criminal Rules at the earlier dates when they were first being considered for adoption only supplies telling confirmation of the conclusion that the provision in Rule 25 for specific relief "after a verdict or finding of guilt" must be read not merely as omitting but rather as positively precluding similar relief *before* verdict or finding of guilt.

The fourth draft of the Criminal Rules Committee, dated May 18, 1942, proposed Rule 25 omitting any language as to "before" or "after" verdict or finding of guilt. It simply read:

> Disability of a Judge.
>
> If by reason of absence from the district, death, sickness, or other disability, the judge before whom the defendant was tried is unable to perform his duties under these rules, any other judge regularly sitting in our assigned to the court may perform his duties.

The Supreme Court reacted negatively, expressing dissatisfaction with the fact that Rule 25, as proposed, "apparently allows one judge to be substituted for another in the midst of a trial or even after all the evidence has been taken, but before the jury is charged." 3 L. B. Orfield, *Criminal Procedure under the Federal Rules*, § 25.1.

To meet the Supreme Court objection, the Criminal Rules Committee "made changes conforming to the criticism by the Supreme Court." The changes were the insertion in the rule of the words "after a verdict or finding of guilt." As so amended, the rule was acceptable to the Supreme Court. The Supreme Court thus established very clearly indeed that saying "after" in such circumstances negates "before."

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defendant preferred that it do so, rather than inevitably having to begin entirely anew. *Contrast State v. Slorah*, 118 Me. 203, 209, 106 Atl. 768, 771 (1919). In a civil case, having to start over would not engage the Fifth Amendment.

6) Finally, it has been suggested that F. R. Civ. P. 83 conferred authority on Judge Murray to continue the trial. The last sentnece of Rule 83 provides: "In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules." However, we have demonstrated that Rule 63 communicates a positive prohibition on substitution of a judge prior to verdict where, as here, all parties have not stipulated their consent.[12] Consequently any attempt of the sort suggested, to resort to Rule 83, must fail since it would produce a result "inconsistent with these rules."[13]

As additional proof of that rather evident proposition consider that the Criminal Rules had a "virtually identical" analogue to Civil Rule 83. F. R. Crim. P. 57(b) reads:

> If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

Yet no one, the Supreme Court, the Judicial Conference of the United States, or the Advisory Committee on Criminal Rules suggested that, in light of Criminal Rule 57(b), the amendment which added F. R. Crim. P. 25(a) was consequently unnecessary. On the contrary, they apparently fully appreciated that a rule amendment was essential. No such amendment has ever been made to the Civil Rules, and that, in a nutshell, disposes of the case.[14]

[12] Even if it be merely by implication, it is nevertheless the meaning of the Rule. Something exists although implied. Its non-existence is in no way established because, as a matter of proving, or of establishing, it, it was implied. Especially is such the case where, as here, the implication is irresistible.

[13] It would also constitute a "basic procedural innovation" which is not permitted under Rule 83. *Miner v. Atlass*, 363 U.S. 641 (1960).

[14] It not being relevant, we do not discuss (far less determine) the issue of whether Ford Credit was prejudiced by being compelled to proceed before a substituted judge following Judge Blair's death. However, the dissent has concluded that there was no demonstrated prejudice. We observe simply that prejudice

In conclusion, it should be observed that our failure to address certain of the questions posed, even though they may arise again on retrial, is not through inadvertence or oversight. While frequently in like circumstances it is appropriate to afford guidance to the trial judge, this in our judgment is not such a case. Our decision that a complete trial *de novo* was required renders, in many respects, a nullity all that happened following Judge Blair's death, yet to address the unanswered questions would require some attention by us to such materials.

Even more significantly, perhaps, the Court finds itself with no fixed uniform view on any of the as yet unresolved issues. It accordingly deems it best to defer consideration and any attempt to dispose of them until they come to the Court after, rather than before, they have been fully litigated.

REVERSED AND NEW TRIAL ORDERED.

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may exist at several levels. One may concern solely the circumstances of the particular case; there is another general institutional level of prejudice. One may wonder, if one judge presumably may substitute for another in the midst of a jury trial without prejudice to an objecting party, why the practice never is employed to ease the operational problems confronting the courts. When a case drags on longer than anticipated, threatening to intrude on long-laid plans of the presiding judge to attend a scheduled judicial conference, why do we not simply substitute another judge, so long as it can be done without "prejudice?"

The lawyers will tell us that in almost every such case the objecting party will perceive substantial prejudice. We should readily perceive it too.

WINTER, Chief Judge, concurring specially:

I concur in the judgment of reversal and the grant of a new trial and in large part in the opinion of Judge Murnaghan.

As the opinions of Judge Murnaghan and Judge Butzner fully expose, the legal issue raised by the death of Judge Blair during the course of the trial and the substitution of Judge Murray is a close one. Except for the unseemliness in this case, and the uncertainty in future litigation, of having of having this issue decided by an equally divided court, I could readily be persuaded to adopt the views espoused by Judge Butzner. Although the framers of Rule 63 and the Congress which approved it may not have intended that it apply in the situation which faces us, I have difficulty in reading into it an implicit prohibition which would limit the far-reaching power to do justice vested in the district court by the last sentence of Rule 83. At the same time I recognize that the courts which have dealt with the problem of the death of the trial judge in the course of a non-jury civil trial have uniformly held that a new trial is mandated. To my mind, a jury trial should be treated differently; but if a majority of our court is unwilling to recognize the distinction, I do not think that I should cast my vote in a way rendering this court powerless to act.

From this case one thing clearly emerges and that is the need for further revision of Rule 63, at least when the presiding judge dies in the course of a civil jury trial and there is no proof that the substitution of another judge will prejudice either party. More is at stake than just this case. With the proliferation of the federal trial judiciary and the increased tensions under which all judges live, there is great risk that our dilemma will recur. It is my hope that the Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States will soon address the problem and make a recommendation so that the Judicial Conference, the Supreme Court and the Congress can take

appropriate action. To this end I will ask the Clerk of this court to send copies of these opinions to the respective Chairmen of the Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure.

BUTZNER, J., with whom HALL, PHILLIPS, and SPROUSE, J.J., join, dissenting:

When a judge who is presiding over a civil jury trial dies before a verdict is returned, the question whether to proceed with the trial rests in the sound discretion of the judge to whom the case is reassigned. This principle, as we shall explain in Part II, is firmly grounded on Federal Rule of Civil Procedure 83, which states in part: "In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules." As a necessary predicate for invoking rule 83, we will show in Part I that rule 63, on which Ford Motor Credit Co. relies, did not require the declaration of a mistrial.

I

Although there are decisions dealing with substitution of judges in criminal trials and civil non-jury trials, no case precisely on point has been called to our attention. Because a judge is not called upon to make findings of fact or resolve credibility disputes in a jury trial, precedent prohibiting substitutions in non-jury trials does not answer the question presented by this case.[1]

[1] State cases provide inappropriate precedent, for the Federal Rules of Civil Procedure were adopted to end conformity with state procedures. *See* 12 Wright & Miller, Federal Practice and Procedure § 3155. Similarly, *Coleshill v. Manchester Corp.*, [1928] 1 K.B. 776, 786 (C.A.), cited to support Ford's position, furnishes uncertain precedent. In *Coleshill*, pursuant to a request by the parties, a substitute judge resumed a jury trial following the death of his predecessor. Notwithstanding the parties' consent, Justice Scrutton expressed doubt about the substitute judge's jurisdiction. The Court of Appeals, nevertheless, reviewed the case on its merits, and the opinions of the other two justices did not question the trial court's jurisdiction.

No statute or rule expressly confers or denies authority to substitute a judge during the trial of a civil jury case. Rule 63 does not forbid substitution before a civil jury has returned a verdict. It provides:

> "If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial."

The genesis of the rule establishes that it was not promulgated to bar substitution of a judge before a civil jury returned its verdict. Section 953 of the Revised Statutes,[2] enacted in 1872, provided for the authentication of a bill of exceptions by a judge of the court in which the cause was tried. This provision was interpreted in *Malony v. Adsit*, 175 U.S. 281, 285 (1899), to mean "that no bill of exceptions can be deemed sufficiently authenticated unless signed by the judge who sat at the trial." In 1900, Congress, reacting to *Malony*, enacted a statute which allowed another judge to rule on a motion for a new trial or an application for allowance of a bill of exceptions in case of the death of the judge who had presided at the trial.[3] *See St. Louis Southwestern Ry. v. Henwood*, 157 F.2d 337, 342 (8th Cir. 1946); 11 Wright & Miller, Federal Practice and Procedure § 2921.

Rule 63 superseded the statute that was enacted in 1900 and extended it to include all of the duties performed by the judge after verdict or judgment.[4] With regard to these

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[2] Act of June 1, 1872, ch. 255, § 4, 17 Stat. 197.

[3] Act of June 5, 1900, ch. 717, § 1, 31 Stat. 270 (codified at 28 U.S.C. former § 776).

[4] "This rule [63] adapts and extends the provisions of U.S.C.A., Title 28, former § 776 (Bill of exceptions; authentica-

duties, the rule makes no distinction between jury and bench trials. It is simplistic to conclude from this identity of treatment, however, that bench and jury trials, which in many respects are quite different, must be treated the same at a stage of the proceedings on which the rule is silent.

Thus, rule 63, the statute from which it was adapted, and decisions dealing with bench trials, do not require the declaration of a mistrial when the presiding judge dies before the jury returns its verdict. Indeed Ford has been unable to cite any authority expressly requiring a mistrial. Such a requirement can only be created by implication, and we decline to expand the scope of rule 63 to reach this unwarranted result.

In the absence of any statute, rule, or federal decision foreclosing the substitution of judges in a civil jury trial, primary support for Ford's position necessarily has been predicated on extracts from the private papers of members of the Advisory Committee on Rules. Several facts caution against reliance on these papers. First, they are not a part of the published Notes of the Advisory Committee on Rules, which the committee deemed appropriate for understanding the derivation and interpretation of the rules.

Additionally, the committee's discussions in 1953 occurred years after rule 63 was adopted. Reliance on these discussions ignores the Supreme Court's admonition in *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980):

> The less formal types of subsequent legislative history provide an extremely hazardous basis for inferring the meaning of a congressional enactment . . . [E]ven when it would otherwise be useful, subsequent legislative history will rarely override a reasonable

tion; signing of by judge) to include all duties to be performed by the judge after verdict or judgment. The statute is therefore superseded." Notes of Advisory Committee on Rules.

> interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.[5]

Indeed, this admonition is particularly appropriate with respect to the Civil Rules, because many years ago the Judicial Conference deemed that the official text of the committee's working papers should not be made accessible for the purpose of litigation.[6]

The danger of relying on the working papers to authoritatively interpret the rules is illustrated by this case. The discussions and letters that are quoted to support Ford's position did not deal with the present issue. They dealt solely with bench trials and the death of a judge before he filed his findings of fact. It is not surprising that the committee members limited their discussion, for they were responding to inquiries about substitution in non-jury trials. For example, the only case identified by name in the extracts is *Ten-O-Win Amusement Co. v. Casino Theatre*, 2 F.R.D. 242 (N.D. Ca. 1942), which was a bench trial. The committee recognized that substitution in a bench trial would require the second judge to decide the facts partially on the basis of a written transcript and partially on the basis of hearing — in the words of a committee member — "flesh-and-blood witnesses." The problems perceived by the committee do not arise, however, when a judge presiding over a jury trial dies, because the jury, not the judge, finds the facts and assesses the credibility of the witnesses.[7]

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[5] As we have previously noted, a reasonable interpretation of rule 63 gleaned from its plain language and the legislative history prior to its adoption shows that the rule was intended to address only the authority of a judge after verdict or filing of findings of fact and conclusions of law.

[6] Letter from the Chief Justice to Judge Francis D. Murnaghan, Jr. (Dec. 18, 1981).

[7] We have no way of knowing how the discussion would have gone if the committee had been asked to address the issue raised by this case. Perhaps they, too, would perceive that rule 63 does not deal with the subject. Rather than expand the rule by implication, they might have come to the conclusion, as we have

The primary sources for interpretation of the rules are rightfully limited to the text itself, published Notes of the Advisory Committee, decisions of the courts, and published commentaries. Wo do not suggest that it was improper to advert to the private papers that members of the Rules Committee have donated to libraries. They are undoubtedly of great interest to scholars of the federal judicial system. Nevertheless, the record of the committee's discussion about a rule long after its promulgation is subject to the general principle that subsequent legislative history is a poor guide for interpretation. Moreover, it is evident from the restrictions placed on the use of the official text of the working papers that the extracts cited to support Ford's position were never intended to be authoratative guides for the interpretation of the rules. That function was reserved for the published Notes of the Committee on Rules.

II

Because neither rule 63 nor any other rule expressly grants or denies a district court the authority to proceed with a pending jury trial when the presiding judge dies, it is necessary to determine what provision the rules make for such a hiatus. The answer, of course, is found in rule 83, which, as we have previously mentioned, states in part: "In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules." This provision of rule 83 "closes all gaps in the rules."[8]

In the absence of any provision governing the procedure that should be followed when a presiding judge dies before

in Part II, that rule 83 "fills the gap" and commits the question of substitution when a jury is the fact finder to the sound discretion of the trial judge. But this supposition, just as reliance on the committee's discussion of non-jury cases to conjecture what they would have said about jury cases, lies in the realm of speculation.

[8] 12 Wright & Miller, Federal Practice and Procedure § 3155 (1973), (quoting Edgar Tolman, Proceedings, Washington Institute on the Federal Rules, 129 (1938)).

a civil jury returns its verdict, there exists a gap in the rules. We believe this gap must be filled by conforming to the mandate of rule 83 and committing the decision whether to proceed with the case to the sound discretion of the district court. When, as here, a district court has exercised the discretion vested in it by rule 83, an appellate tribunal should not interfere "in the absence of a showing of arbitrariness or fundamental unfairness." In *re United Corporation*, 283 F.2d 593, 596 (3d Cir. 1960).

We find support for this conclusion in *Colgrove v. Battin*, 413 U.S. 149 (1973), where the Court declined to find in rule 48 an implied requirement for juries of twelve.* Referring to the generally accepted assumption that "trial by jury means 'a jury of twelve,'" the Court said: "Plainly the assumption of the draftsmen that such was the case cannot be transmuted into an implied direction to impanel juries of 12 without regard to whether a jury of 12 was required by the Seventh Amendment." 413 U.S. at 163. The Court therefore found no inconsistency with a local rule adopted pursuant to rule 83 providing for juries of six persons. We, too, refuse to search for implications in order to invalidate the exercise of a district court's discretion under rule 83.

Application of rule 83 in this case conforms to the fundamental precept that although individual judges may die or become incapacitated, the court on which they served is a continuing institution. This was the approach taken in *St. Louis Southwestern Ry. v. Henwood*, 157 F.2d 337, 342 (8th Cir. 1946). There the issue arose in a bankruptcy proceeding where, as here, no rule expressly governed the question of substitution. For this reason, the court's reasoning is instructive:

> Theoretically and actually, a "Court" is a continuing and continuous institution. . . . Normally, matters therein flow uninterruptedly onward to final-

* Rule 48 provides in part: "The parties may stipulate that the jury shall consist of any number less than twelve. . . ." In *Colgrove* the parties refused to stipulate.

ity. A change in personnel of judges during the course of litigation presents a problem of interruption. Such changes have occurred at different stages of suits and with varying results as to whether the successor judge could go forward or should retrace some of the ground travelled by his predecessor.

An examination of the reasoning underlying the opinions and producing their results is convincing that the flow of a suit is interrupted by changes in personality of judges only where justice — for which courts exist — seems so to require. Unless justice demands something else, a different judge takes up litigation where the former judge left off. Where this is not done, it is, broadly, because of something in the past course of the litigation which cannot be found in the status and record existing when the new judge takes hold and which it is necessary for him, in all fairness to the parties, to know. Where it is necessary for him to gain this absent information, he must set back the litigation to the place where he can obtain it.

How and by whom is the existence of such necessity to be determined? In some instances, the law speaks through some affirmative legal requirement: *Malony v. Adsit*, 175 U.S. 281 (1899). In other instances, the successor judge has power, through the exercise of a reviewable judicial discretion, to determine on the situation in which he finds himself.

Recognition that a court is a continuing institution places the question of substitution in its proper light. Accepting this premise, the propriety of substitution in a jury case is committed to the discretion of the district judge as an aspect of the court's general authority pertaining to mistrials. In many instances, discretion should dictate a mistrial. In other cases, where the jury, the court, and the parties have invested substantial time and money in the trial and substitution can be made without prejudice, we perceive no sound reason for denying a judge the discretion to proceed with the trial after the death of his predecessor to whom the case had been initially assigned.

Rule 63 recognizes that a court is a continuing institution. It was drafted to confer broad discretion on a judge who succeeds an incapacitated colleague. By its terms, the rule empowers the successor to perform the duties authorized by the civil rules after a verdict is returned or findings and conclusions are filed. These duties are not simply ministerial. Included among them are the power to grant or deny new trials, judgments notwithstanding the verdict, relief after judgment, stays pending appeal, and the authority to settle differences about the accuracy of the record. These duties are in many ways as demanding as the duties of a presiding judge before verdict. Nevertheless, Ford has advanced no principled reason why a court should be allowed to perform such important functions after verdict and yet be granted only the power to declare a mistrial before verdict. It is not enough to claim that the draftsmen of the rules assumed that a mistrial must be declared when the presiding judge dies before a verdict is returned. As *Colgrove v. Battin*, 413 U.S. 149, 163 (1973), teaches, assumptions of the draftsmen "cannot be transmuted" into implied restrictions on the discretion granted to a court by rule 83 in the absence of authority compelling the assumption. Ford cites no such authority.

In concluding that a district court should be permitted to exercise its discretion when the need for substitution arises, we are also influenced by the 1966 amendment to Federal Rule of Criminal Procedure 25. Subsection (a)[10] was added to provide:

> If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial.

There are neither logical nor pragmatic reasons for allowing a criminal jury trial, involving the liberty and

[10] Subsection (b) is similar to Fed. R. Civ. P. 63.

reputation of a person, to go forward after the death of the trial judge while a civil jury trial, involving lesser stakes, must inevitably grind to a halt though neither party would be prejudiced by substitution.

We cannot accept the suggestion that the lack of a civil rule similar to criminal rule 25(a) establishes that a judge in a civil jury case lacks the authority to proceed that he has in a criminal case. Such an argument, though superficially appealing, overlooks the broad discretion that a judge has always exercised over mistrials in civil cases. The argument also ignores the different circumstances prompting the revision of rule 25 without a corresponding revision of rule 63. The revisers of rule 25 were confronted by an increasing number of protracted criminal cases[11] and a decision, *Freeman v. United States*, 227 F. 732 (2d Cir. 1915), holding that a criminal defendant was constitutionally entitled to the declaration of a mistrial upon the death of the presiding judge.[12] In contrast, no federal case has been cited that requires a mistrial in civil jury trials when a judge dies before return of a verdict. It is therefore understandable that rule 63 was not amended along with rule 25.

In sum, we recognize that a district court has broad discretion to grant or deny mistrials in civil cases. This general rule applies to diverse circumstances.[13] No statute, rule, or controlling case law expressly prohibits the court from exercising the discretion to deny a mistrial when a judge presiding over a civil jury trial dies before the return of a verdict. We decline to engraft on the civil rules an implied prohibition of this nature, because such an

[11] *See* Notes of Advisory Committee on Rules, 1966 amendment to rule 25.

[12] Notwithstanding *Freeman*, the amendment to rule 25 suggests that substitution of a judge is not prohibited by the Constitution. We agree and set forth our reasons in part IV.

[13] *See, e.g., Standard Industries, Inc. v. Mobil Oil Corp.*, 475 F.2d 220, 228-29 (10th Cir. 1973); *Burger Chef Systems, Inc. v. Govro*, 407 F.2d 921, 933 (8th Cir. 1969); *Traders and General Insurance Co. v. Mallitz*, 315 F.2d 171, 173-74 (5th Cir. 1963).

implication lacks an authoritative basis, and it would be contrary to the discretionary authority which rule 83 grants to district courts.

III

Deciding whether Judge Murray properly exercised his discretion by proceeding with the trial need not long detain us. The case was initially assigned to Judge C. Stanley Blair, who ruled on a number of pre-trial motions, empanelled the jury, and presided over the first three weeks of trial. After his death, Ford moved for a mistrial. Judge Murray, to whom the case had been reassigned, denied the motion, setting forth his reasons in a carefully considered opinion. Working diligently, Judge Murray was able to review, before the case was submitted to the jury, the entire pre-trial record and the transcript of the prior proceedings.

Ford has not shown that it was prejudiced by the substitution of Judge Murray for Judge Blair. The record discloses that Judge Murray conducted the trial with full knowledge of the proceedings and without prejudice to either party. He properly utilized the services of the jury, conserved expenses to the parties and the government, and promoted the efficient administration of a busy court. He did not abuse his discretion by refusing to declare a mistrial.

Having determined that no statute, rule, or decision barred Judge Murray's resumption of the trial, we turn to Ford's claim that refusal to declare a mistrial infringed its seventh amendment rights. Ford bases its constitutional argument on the well recognized principle that the right of trial by jury secured by the seventh amendment means trial by a jury under the superintendence of a judge. Relying primarily on criminal cases that antedate the 1966 amendment to Rule 25,[14] Ford contends that proceeding after the death of a trial judge by substituting another judge "contravenes the seventh amendment."

[14] *See, e.g., Simons v. United States*, 119 F.2d 539 (9th Cir. 1941); *Freeman v. United States*, 227 F. 732 (2d Cir. 1915).

We accept, of course, the proposition that trial by jury means a jury under the superintendence of a judge. *See Capital Traction Co. v. Hof*, 174 U.S. 1, 13-14 (1899). But we cannot accept Ford's argument that the seventh amendment requires a mistrial when the judge dies before the jury returns a verdict. The pertinent provision of the seventh amendment is: "In suits at common law . . . the right of trial by jury shall be preserved. . . ." In *Colgrove v. Battin*, 413 U.S. 149 (1973), the Court held that this provision of the amendment did not require a jury of 12 persons. In reaching this conclusion the Court said, 413 U.S. at 156-57:

> Consistently with the historical objective of the Seventh Amendment, our decisions have defined the jury right preserved in cases covered by the Amendment, as "the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure. . . ." The Amendment, therefore, does not "bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791," and "[n]ew devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. . . ." [citations omitted]

Applying these principles, we conclude that the seventh amendment does not require that the proceedings must be conducted by the same judge. Resumption of a trial after the death of a judge does not trespass on "the substance of the common-law right of trial by jury." It raises a procedural question whose resolution may vary from case to case. Tested by these principles, substitution is not forbidden by the seventh amendment.

Because the district court's order denying a mistrial should be affirmed, we dissent.

United States Court of Appeals
for the Fourth Circuit

No. 80-1496

Cornelius M. Whalen, etc.,
Appellee,

v.

Ford Motor Credit Company, etc.,
Appellant.

ORDER

(Filed February 10, 1982)

Upon consideration of the suggestion for rehearing en banc and, a majority of the court having voted for rehearing,

IT IS ORDERED that the above case will be reheard en banc at the April 1982 Session (week of March 29-April 2, 1982).

Entered at the direction of Judge Butzner.

For the Court

WILLIAM K. SLATE, II,
Clerk.

United States Court of Appeals
for the Fourth Circuit

No. 80-1496

Cornelius M. Whalen, t/a Towson Associates Limited Partnership, to its own use and to the use of Robert Whalen Company, Inc.,

Appellee,

v.

Ford Motor Credit Company, a body corporate,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Herbert F. Murray, Judge.

Argued Jan. 8, 1981 *Decided Sept. 1, 1981*

Before BUTZNER, MURNAGHAN, and SPROUSE, Circuit Judges.

Paul V. Niemeyer (Jeffrey D. Herschman, William L. Marbury, Piper and Marbury on brief) for appellant; David Freishtat (Michael L. Schwartz, Freishtat, Schwartz & Sandler on brief) for appellee.

BUTZNER, Circuit Judge:

In this diversity case, Ford Motor Credit Co. appeals from a judgment awarding $4,294,746 to Towson Associates, developer of a condominium, for breach of a

financing commitment. Finding no cause for reversal in Ford's assignments of error, we affirm.

I

Ford asserts that the death of the judge who was trying the case required a mistrial. It contends that reassignment to another judge who proceeded with the trial contravenes the seventh amendment.

The case was initially assigned to Judge C. Stanley Blair, who ruled on a number of pre-trial motions, empanelled the jury, and presided over the first three weeks of trial. After his death, Ford moved for a mistrial. Judge Murray, to whom the case had been reassigned, denied the motion, setting forth his reasons in a carefully considered opinion. Working diligently, Judge Murray was able to review, before the case was submitted to the jury, the entire pre-trial record and the transcript of the proceedings over which Judge Blair had presided in the three weeks before his death. Judge Murray appears to have become as well informed as Judge Blair about the early weeks of trial with the single exception that Judge Murray did not see the witnesses testify. This difference is immaterial, for it was the function of the jury, not the trial judge, to assess the credibility of the witnesses.

There is no indication in the record that Judge Murray was unfamiliar with the case when he made various rulings and when he charged the jury. In its brief, Ford speculates that Judge Blair might have changed his mind about rulings that he made. Ford does not identify these rulings or offer any proof in support of its speculation. Ford has not shown that it was prejudiced by the substitution of Judge Murray for Judge Blair. Indeed, the record discloses that Judge Murray conducted the trial with full knowledge of the proceedings and without prejudice to either party.

The decision to grant or deny a mistrial is ordinarily committed to the sound discretion of the trial judge. This

general rule applies to diverse circumstances. *See, e.g.*, Standard Industries, Inc. v. Mobil Oil Corp., 475 F.2d 220, 228-29 (10th Cir. 1973); Burger Chef Systems, Inc. v. Govro, 407 F.2d 921, 933 (8th Cir. 1969); Traders and General Insurance Co. v. Mallitz, 315 F.2d 171, 173-74 (5th Cir. 1963). Unquestionably, if Judge Murray had authority to proceed with the case, he exercised his discretion soundly in refusing to jettison three weeks of trial. The jury was available to continue with the trial. The testimony and other incidents of trial had been recorded. Although a daily transcript was not available, copies were ordered after Judge Blair's death for Judge Murray's use. He was able to master the intricacies of the controversy and to prepare intelligently to serve as a substitute for Judge Blair.

Judge Murray's decision prejudiced no one. On the contrary, it properly utilized the services of the jury, conserved expenses to the parties and the government, and promoted the efficient administration of a busy court. The critical question, therefore, is not whether Judge Murray abused his discretion but whether the law authorized him to proceed with the trial.

Before reaching the constitutional question which Ford raises, we must consider other grounds for decision. *See* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J.). No statute or rule expressly confers or denies authority for the substitution of a judge in a civil jury case. Although there are many decisions dealing with substitution in non-jury and criminal trials, no case precisely on point has been called to our attention.[1]

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[1] *See, e.g.*, Arrow-Hart, Inc. v. Philip Carey Co., 552 F.2d 711, 712-13 (6th Cir. 1977) (non-jury); United States v. Sundstrom, 489 F.2d 859, 862-63 (2d Cir. 1973) (criminal); Harvey v. Kropp, 458 F.2d 1054, 1055 (6th Cir. 1972) (non-jury); Bromberg v. Moul, 275 F.2d 574, 576 (2d Cir. 1960) (non-jury); Brennan v. Grisso, 198 F.2d 532, 532-33 (D.C. Cir. 1952) (non-jury); Moore's Federal Procedure § 59.08[2]; Wright, Criminal Procedure § 392.

Federal Rule of Civil Procedure 63 provides:

> If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform these duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

The rule does not expressly address the question of substitution in a jury trial before the verdict is returned. Moreover, the genesis of the rule demonstrates that it was not promulgated to address this subject. Section 953 of the Revised Statutes,[2] enacted in 1872, provided for the authentication of a bill of exceptions by the judge of the court in which the cause was tried. This provision was interpreted in Malony v. Adsit, 175 U.S. 281, 285 (1899), to mean "that no bill of exceptions can be deemed sufficiently authenticated unless signed by the judge who sat at the trial. . . ."

In 1900, Congress, reacting to *Malony*, enacted a statute which allowed another judge to rule on a motion for a new trial or an application for allowance of a bill of exceptions in case of the death of the judge who had presided at the trial.[3] *See* St. Louis Southwestern Railway Co. v. Henwood, 157 F.2d 337, 342 (8th Cir. 1946); 11 Wright and Miller, Federal Practice and Procedure § 2921. Rule 63 superseded this statute and extended it to include all of the duties performed by the judge after verdict or judgment. See Advisory Committee Note. Hence, Rule 63 was written to expand, not to restrict, the authority of

[2] Act of June 1, 1872, ch. 255, § 4, 17 Stat. 197.

[3] Act of June 5, 1900, ch. 717, § 1, 31 Stat. 270, codified at 28 U.S.C. former § 776.

another judge to proceed following the death of the initial trial judge.

It is quite apparent, however, that a logical argument can be constructed to interpret the rule as impliedly prohibiting substitution before the jury returns its verdict. Nevertheless, relying on the evolution of the rule and recognizing that pragmatism is sometimes a surer guide than logic, we decline to enlarge the scope of the rule by resorting to implication.

The proper course, it seems to us, is to leave the question of substitution to the sound discretion of the trial court. This is the approach taken in St. Louis Southwestern Railway Co. v. Henwood, 157 F.2d 337, 342 (8th Cir. 1946). There the issue arose in a bankruptcy proceeding where, as here, no rule expressly governed the question of substitution. For this reason, the court's reasoning is instructive:

> Theoretically and actually, a "Court" is a continuing and continuous institution. . . . Normally, matters therein flow uninterruptedly onward to finality. A change in personnel of judges during the course of litigation presents a problem of interruption. Such changes have occurred at different stages of suits and with varying results as to whether the successor judge could go forward or should retrace some of the ground travelled by his predecessor.
>
> An examination of the reasoning underlying the opinions and producing their results is convincing that the flow of a suit is interrupted by changes in personality of judges only where justice — for which courts exist — seems so to require. Unless justice demands something else, a different judge takes up litigation where the former judge left off. Where it is not done, it is, broadly, because of something in the past course of the litigation which cannot be found in the status and record existing when the new judge takes hold and which it is necessary for him, in all fairness to the parties, to know. Where it is necessary

> for him to gain this absent information, he must set back the litigation to the place where he can obtain it.
>
> How and by whom is the existence of such necessity to be determined? In some instances, the law speaks through some affirmative legal requirement. . . . In other instances, the successor judge has power, through the exercise of a reviewable judicial discretion, to determine on the situation in which he finds himself.

Recognition that a court is a continuing institution places the question of substitution in its proper light. In the absence of an affirmative legal requirement, the propriety of substitution is committed to the discretion of the district judge as an aspect of his general authority pertaining to mistrials. In many instances, discretion should dictate a mistrial. In other cases, where the jury, the court, and the parties have invested substantial time and money in the trial and substitution can be made without prejudice, we perceive no sound reason for denying a judge the discretion to proceed with the trial after the death of his predecessor to whom the case had been initially assigned.

In reaching this conclusion, we are influenced by the 1966 amendment to Rule of Federal Criminal Procedure 25. Subsection (a)[4] was added to provide:

> If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial.

Again, we realize that one can argue that the absence of a similar provision in the civil rules indicates that a judge in a civil case lacks the discretion to proceed that he has in a criminal case. Such an argument, though superficially appealing, overlooks the broad discretion that a judge has

[4] Subsection (b) is similar to Fed. R. Civ. P. 63.

always exercised over mistrials in civil cases. Moreover, there are neither logical nor pragmatic reasons for allowing a criminal jury trial, involving the liberty and reputation of a person, to go forward after the death of the trial judge while a civil jury trial, involving lesser stakes, must inevitably grind to a halt.

In sum, we recognize that a district court has broad discretion to deny mistrials in civil cases. No statute, rule, or controlling case law expressly prohibits it from exercising this authority when a judge presiding over a civil jury trial dies before the jury returns a verdict. We decline to engraft an implied prohibition of this nature on the civil rules, especially since such a prohibition would be contrary to the policy established by the criminal rules.

Having determined that there is no non-constitutional bar to the action Judge Murray took, we turn to the issue Ford raises pertaining to the seventh amendment. Ford bases its constitutional argument on the well recognized principle that the right of trial by jury secured by the seventh amendment means trial by a jury under the superintendence of a judge. Relying on criminal cases that antedate the 1966 amendment to Rule 25,[4] Ford contends that proceeding after the death of a trial judge by substituting another judge "contravenes the seventh amendment."

We accept, of course, the proposition that trial by jury means a jury under the superintendence of a judge. *See* Capital Traction Co. v. Hof, 174 U.S. 1, 13-14 (1899). But we cannot accept Ford's argument that the seventh amendment requires a mistrial when the judge dies before the jury returns a verdict.

The pertinent provision of the seventh amendment is: "In suits at common law . . . the right of trial by jury shall be preserved. . . ." In Colgrove v. Battin, 413 U.S. 149 (1973), the Court held that this provision of the

[4] *See, e.g.*, Simons v. United States, 119 F.2d 539 (9th Cir. 1941); Freeman v. United States, 227 F. 732 (2d Cir. 1915).

amendment did not require a jury of 12 persons. On the contrary, a jury of six, as provided by local rule of a district court, satisfied the seventh amendment. In reaching this conclusion the Court said, 413 U.S. at 156-57:

> Consistently with the historical objective of the Seventh Amendment, our decisions have defined the jury right preserved in cases covered by the Amendment, as "the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure. . . ." The Amendment, therefore, does not "bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791," and "[n]ew devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. . . ."

Applying these principles, we conclude that although a jury trial means a trial under superintendence of a judge, the seventh amendment does not require that the proceedings must be conducted by the same judge. Whether the trial may proceed after the death of a judge is not of "the substance of a common-law right of trial by jury." In the absence of demonstrable prejudice, substitution, in and of itself, does not impinge on the substantive rights of litigants to trial by jury. It raises a procedural question whose resolution may vary from case to case. Substitution is not forbidden by the seventh amendment. Substitution may be governed by statute, by rule, such as Federal Rule of Criminal Procedure 25, or, as here, in the absence of these, by the sound discretion of the judge to whom the case has been reassigned.

II

The remaining assignments of error require a brief summary of the facts, which are set forth in detail in Judge Blair's opinion, Whalen v. Ford Motor Credit Co., 475 F. Supp. 537 (D. Md. 1979). Towson undertook to construct a high-rise condominium. It paid Ford a

$195,000 non-refundable fee for a loan commitment under which Ford agreed to lend $9,750,000 for a period of two years after completion of the project. Ford's obligation was contingent on Towson's satisfying a number of conditions including completion of the building by March 1, 1975. The completion date was extended to September 1, 1975, in consideration of an additional fee of $48,750. Towson planned to repay Ford by the sale of condominiums during the two-year period of the loan.

Towson next obtained a commitment from Equibank for a construction loan of $9,750,000. With the consent of Ford, Towson assigned Ford's commitment to Equibank. At the same time, Ford and Equibank entered into what financiers call a "buy-sell" agreement, under which Ford agreed to buy from Equibank, and Equibank agreed to sell, the construction loan in the amount of $9,750,000, provided Towson complied with all conditions of the commitment including completion of construction by September 1, 1975.

On September 1, 1975, Ford declined to purchase the loan from Equibank, asserting that because the building was not complete, Towson had failed to satisfy conditions precedent for Ford's loan. Ford persisted in its refusal notwithstanding Equibank's previous offer to place in escrow funds amounting to 150% of the cost of tenant improvements as determined by Ford's inspector.

Equibank sued Ford, and in settlement of this action it received a substantial sum for which it released Ford from liability to Equibank on Ford's commitment and the buy-sell agreement.

Unable to pay Equibank without the proceeds of the Ford loan, Towson and its partners, who had guaranteed payment of the construction loan, were faced with foreclosure. They settled with Equibank by conveying the condominiums and several other parcels of land to Equibank. The guarantors gave a new note payable in 30 months or "upon conclusion of Towson's suit against Ford."

Equibank assumed liability for certain obligations Towson owed to subcontractors.

Towson then brought this action against Ford, alleging breach of both the loan commitment and the Ford-Equibank buy-sell agreement. Towson claimed that its settlement with Equibank constituted a reassignment of the Ford loan commitment from Equibank to Towson or a revocation of the original assignment.

Ford moved for summary judgment, contending that Towson's assignment of Ford's commitment to Equibank and the subsequent settlement of Equibank's action against Ford barred Towson from suing Ford for breach of the commitment.

Judge Blair denied Ford's motion for summary judgment. He held that the assignment of the commitment, though absolute on its face, actually was made to provide security for Equibank's construction loan. Additionally, Judge Blair held that Towson was a third-party beneficiary of Ford's agreement to buy the Equibank construction loan. We affirm Judge Blair's denial of summary judgment for reasons adequately stated in his opinion, Whalen v. Ford Motor Credit Co., 475 F. Supp. 537, 539-40 (D. Md. 1979).

In a subsequent pre-trial ruling, without opinion, Judge Blair held that as a matter of law Towson's action was not barred, in effect granting summary judgment for Towson on this issue. Ford protests that it was entitled to submit this issue to the jury for ascertainment of the parties' intentions in making the assignment and executing the buy-sell agreement. It relies on proffered testimony of Equibank's attorney to the effect that the assignment was intended to vest in Equibank all of Towson's right, title, and interest in the Ford commitment. Because Judge Blair summarily refused, without an opinion, to submit this issue to the jury, we will briefly address it.

We conclude that Judge Blair properly determined that there was no genuine issue of material fact concerning Towson's right to maintain this action and that, consequently, Towson was entitled to summary judgment on this issue. Towson had paid Ford nearly a quarter of a million dollars for Ford's loan commitment. When Towson assigned this commitment to Equibank, and Ford and Equibank entered into the buy-sell agreement of the construction loan, the parties contemplated, as evidenced by the contemporaneously executed documents, that Towson would retain its interest in the project subject to its liability to Equibank and its potential liability to Ford.

Equibank was fully apprised that the source of payment for its construction loan was the Ford commitment. Prudent banking therefore dictated that it take an assignment of this commitment for the purpose of securing repayment of the funds it advanced for construction. The testimony of Equibank's counsel, on which Ford relies, must be read in the context of his explanation of the purpose of the assignment. He said: "Well, as additional security for the loan and in order to be able to be put in the borrower's place, we require generally an assignment of the permanent commitment [Ford], from the borrower [Towson] to our client, the construction lender [Equibank]." Under Maryland law, an assignment absolute on its face may be shown by parole evidence actually to have been made as collateral security. Hodgson v. Burroughs, 175 Md. 413, 426-27, 2 A.2d 407, 413 (1938).

Equibank confirmed the assignment's role as security by recognizing Towson's cause of action against Ford in its settlement agreement with Towson. This agreement, which discharged Towson's obligation to Equibank, operated as a reassignment of the commitment to Ford. 4 Corbin, Contracts § 881 (1951). Towson retained an interest in the commitment sufficient to establish its status as a real party in interest under Federal Rule of Civil Procedure 17(a). 6 Wright and Miller, Federal Practice and Procedure § 1545.

Apart from the question of the assignment, there is also no genuine issue of fact concerning Towson's status as a third-party beneficiary of the Ford-Equibank buy-sell agreement. As Judge Blair explained in Whalen v. Ford Motor Credit Co., 475 F. Supp. 537, 540 (D. Md. 1979), this agreement was intended to facilitate the execution of Ford's commitment to provide Towson permanent financing for the project. Since Towson alleged that Ford breached this agreement, it was entitled to maintain this action. *See* St. Paul at Chase Corp. v. Manufacturers Life Insurance Co., 262 Md. 192, 231-34, 278 A.2d 12, 31-32 (1971).

We therefore conclude that the district court properly held as a matter of law that Towson could sue Ford under either Ford's loan commitment or as a third-party beneficiary of the Ford-Equibank agreement.

III

Ford's principal defense is that Towson did not satisfy the conditions of the loan commitment by September 1, 1975. These conditions included:

> (1) Satisfaction of the requirement that "all buildings and improvements on the property shall be completed;"
>
> (2) Delivery of "the architect's certificate to the effect that the improvements contemplated by the commitment have been completed;"
>
> (3) Delivery of "a certificate of occupancy" for the improvements; and
>
> (4) Satisfaction of the requirement that "all construction shall be of good quality".

Ford contends that "completion" requires full performance of the contract, satisfaction of the punch list, and correction of all known deficiencies — in short, 100% completion. In support of its position, Ford correctly points out that it is undisputed that on September 1, 1975, the project was

not fully completed and the architect gave only a certificate of partial occupancy. Moreover, the first floor, which was intended for commercial tenants, and the top floor, which was intended for penthouse units, had not been finished.

Towson contends that the commitment required only substantial completion. It also asserts that the parties understood that the commercial space on the first floor and the penthouses on the top floor were to be designed by the tenants. According to Towson, the parties contemplated that these spaces would not be finished until the architect and the tenants agreed on the plans for these floors.

Ford raised the issue of completion by motion for summary judgment, by a motion for a directed verdict, and by objection to instructions charging the jury that substantial completion satisfied the conditions of the commitment.

Judge Blair denied Ford's motion for summary judgment. In his opinion he fully addressed the contentions of the parties and concluded that substantial completion satisfied the conditions of the commitment. At the same time he denied Towson's motion for summary judgment, noting that conflicting evidence raised a question of fact concerning the claim that the project was substantially completed by September 1, 1975. Judge Blair's opinion is supported by the authorities on which he relied.[6] In contrast, Ford has not cited any case in which a permanent lender's refusal to honor its commitment was held to be justified because the project was only substantially completed. Accordingly, we affirm the denial of Ford's motions for summary judgment and directed verdict for reasons adequately stated in Judge Blair's opinion.

[6] *See, e.g.*, First National State Bank v. Commonwealth Federal Savings and Loan Ass'n, 455 F. Supp. 464, 468-69 (D.N.J. 1978); St. Paul at Chase Corp. v. Manufacturers Life Insurance Co., 262 Md. 192, 278 A.2d 12, 29-32 (1971); Selective Builders, Inc. v. Hudson City Savings Bank, 137 N.J. Super. 500, 349 A.2d 564 (1975).

Whalen v. Ford Motor Credit Co., 475 F. Supp. 537, 540-52 (D. Md. 1979).

In view of the conflicting evidence about the state of completion and the quality of construction, Judge Murray submitted these questions to the jury under proper instructions that placed the burden of proof on Towson. He also explained to the jury the contentions of the parties concerning the unfinished floors and then instructed the jury on this issue:

> If you conclude from all the evidence and the conduct of the parties that the first floor and penthouse units were not to be completed until sold, even if that did not take place until after September second, 1975, then the incompletion of those units cannot be asserted by Ford as a ground for not funding. On the other hand, if you find Ford had sound ground to believe that those units should be completed by September second, it could constitute a basis for not funding if the state of incompletion was such as to significantly affect its security and completion could not be had in a reasonable time.

Answering interrogatories on the questions of substantial completion and the quality of construction, the jury returned a verdict in favor of Towson. Having carefully considered Ford's several assignments of error pertaining to these issues and its objections to the court's instructions, we find no cause for reversal either of fact or law in this aspect of the case.

IV

Judge Murray instructed the jury that if it found that Ford breached its loan commitment, Towson would be entitled to recover as damages all reasonably incurred development costs that it put into the project up to the time of the conveyance to Equibank. The judge fully explained the elements of these damages and how they were to be computed. He cautioned that Towson could recover only for loss reasonably foreseeable from Ford's

failure to fund its commitment. He also instructed the jury to consider Towson's receipts as offsets to its development costs. He set forth the contentions of the parties with respect to damages, and he explained to the jury the factual issues they should resolve. Further, he instructed the jury about Towson's burden of proof and its duty to mitigate its damages.

Ford's principal assignment of error asserts that the court improperly excluded evidence demonstrating that even if Ford had supplied the funds to finance the project, Towson would have sustained greater losses because the market for condominiums was depressed. Because of these circumstances, Ford contends, Towson's equity in the project was destroyed and it was not entitled to recoup any of its development costs. In support of its position, Ford relies on Restatement (First) of Contracts § 333(d), which provides that if performance would have resulted in a net loss to the plaintiff, the amount of loss must be deducted from the plaintiff's expenditures. Ford cites cases applying this principle to contracts in general.

We cannot accept Ford's position. Apart from the speculative nature of the proof of Towson's ultimate losses, Ford's reliance on § 333 of the Restatement is misplaced. Ford's commitment was a contract to lend money. Damages for breach of this kind of contract are addressed in § 343 of the Restatement. As explained in *Illustration 3* of this section, when, as here, the borrower cannot obtain alternative financing for the construction of a building, he can obtain judgment "for the amount of his expenditures on the building."

Ford's position is fundamentally wrong. It would improperly permit a permanent lender, who has been paid a substantial commitment fee to assume the risk of a project's viability, to dishonor its commitment with impunity if, after construction has been substantially completed, the project is shown to be unprofitable. *See* First National State Bank v. Commonwealth Federal Savings & Loan Association, 610 F.2d 164, 173-74 (3d Cir. 1979). Under

such a rule it is unlikely that any developer could obtain a construction loan.

Judge Murray properly rejected Ford's proffer as irrelevant, and he correctly instructed the jury on the measure and elements of recovery. *See* St. Paul at Chase Corp. v. Manufacturers Life Insurance Co., 262 Md. 192, 278 A.2d 12 (1971). His allocation of the risk of loss is consistent with the theory of the leading cases on this subject. *See, e.g.*, First National State Bank v. Commonwealth Federal Savings & Loan Association, 610 F.2d 164 (3d Cir. 1980); Mellon Bank, N.A. v. Aetna Business Credit, Inc., 468 F. Supp. 656 (W.D. Pa. 1979); Pipkin v. Thomas & Hill, Inc., 258 S.E.2d 778 (N.C. 1979); Selective Builders, Inc. v. Hudson City Savings Bank, 137 N.J. Super. 500, 349 A.2d 564 (1975); St. Paul at Chase Corp. v. Manufacturers Life Insurance Co., *supra*.

We find no grounds for reversal in Ford's assignments of error pertaining to specific elements of damage and to the jury's allowance and the court's computation of prejudgment interest.

The judgment of the district court is affirmed.

MURNAGHAN, Circuit Judge, dissenting:

I.

It is trite, but true that civil cases proceed either before the court or before a jury. It is equally true that the procedure is governed, in either case, by the Federal Rules of Civil Procedure. *See* F. R. Civ. P. 1.

Those rules customarily approach each procedural situation on a composite basis, setting out a uniform procedure to govern, in the same fashion, except to the extent specifically modified, judge trials and jury trials alike. As an example of specific modification see Rule 51 (Instructions to the Jury: Objection) and Rule 52 (Findings by the

Court). They deal with the inescapable difference that the jury returns a coalescence, a verdict, which is the unanimous, joint effort of six, whereas a judge, acting by himself, individually produces findings of fact and conclusions of law.

The more customary composite rule designed to eliminate distinctions between jury and non-jury procedures is exemplified by Rule 58 (Entry of Judgment) (". . . upon a general verdict of a jury, or upon a decision by the court . . . the clerk . . . shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court;").

The Rule which here governs is F. R. Civ. P. 63 (Disability of a Judge). It is clearly a composite rule:

> If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

The question presented is a simple one to state, if the answer is not without its complexities:

> May, over the objection of one of the parties, the district court require a case being tried before a jury to continue, with a new judge substituted, where the initial judge has died after the case has commenced, but *before* the taking of evidence has been completed and a verdict has been returned?

The authorities are uniform, consistently giving a negative response to the question, and holding that the case must be tried again *de novo*, wherever Rule 63 governs. *Arrow-Hart, Inc. v. Philip Carey Co.*, 552 F.2d

711 (6th Cir. 1977) ("However, in the absence of unanimous agreement of the parties, and where, as here, there is no oral or written expression of the deceased judge reasonably satisfying the requirements of Rule 52 concerning findings of fact and conclusions of law, we hold that a new trial is required and that Judge Siler was correct in his construction of Rule 63"); *Bromberg v. Moul*, 275 F.2d 574 (2d Cir. 1960) ("The case was tried by Judge Knight without a jury in March, 1955, and soon after he died without having made any findings or decision. . . . It is plain that this rule (Rule 63) is inapplicable [insofar as permitting continuance with a substitute judge was concerned] since no findings of fact and conclusions of law were filed."); *Brennan v. Grisso*, 198 F.2d 532 (D.C. Cir. 1952) ("The late Judge Goldsborough heard the case without a jury. He expressed orally the belief that appellant had not been domiciled in Florida and that the divorce was invalid. He filed no findings of fact or conclusions of law and no opinion or memorandum. On June 6, 1951, he said 'the bill of complaint is dismissed', but he did not order judgment to be entered and judgment was not entered. . . . The Rule [Rule 63] thus shows a generous attitude toward a new trial when the trial judge dies before the case is disposed of. . . . In view of these considerations, we think Rule 63 should not be interpreted so broadly as to dispense with the necessity of a new trial upon the death of the trial judge."); *Ten-O-Win Amusement Co. v. Casino Theatre*, 2 F.R.D. 242 (N.D. Calif. 1942) (The judge had announced a decision in favor of plaintiff, entering judgment "upon the filing of approved findings of fact and conclusions of law." After setting out the text of Rule 63, the court stated: "The language of the rule seems clear and no Federal case has been found interpreting it. . . . As findings of fact and conclusions of law herein were not 'filed' by Judge LOUDERBACK before his death, I have no power to sign and file them now. A new trial will be therefore granted as to defendant Donohue."). *Cf. Havey v. Kropp*, 458 F.2d 1054 (6th Cir. 1972) ("The case was thoroughly briefed, argued and was submitted, but the

District Judge died without announcing a decision. It was subsequently discovered that he had prepared what appeared to be an opinion in final form granting the writ of habeas corpus, but since it had not been filed the case was assigned to another judge. The second judge, being of the view that one issue of fact existed, held a limited evidentiary hearing and further argument, and then filed an opinion denying habeas corpus relief and dismissing the petition. This appeal was perfected from that order, and in the argument above referred to, appellant urges that the second District Judge should have, as a matter of law, filed or caused to be filed the opinion and order of her deceased colleague. Appellant offers no direct authority in support of this argument, but urges that under Rule 63, Federal Rules of Civil Procedure, (which we conclude to be without application), the deceased judge's opinion could have been filed and judgment entered. . . . We hold that Judge Kennedy, from whose order the present appeal was perfected, was not required as a matter of law to file or be bound by the unfiled draft, . . .").

It should not surprise us that Rule 63 has been consistently and uniformly read in the same way to reach the same result. As a simple matter of language, what else is a rule to be taken to mean when it states that another judge may substitute for a deceased judge "after a verdict is returned or findings of fact and conclusions of law are filed?" It unambiguously indicates that the power of substitution is not conferred where the death occurs before a verdict is returned or findings of fact and conclusions of law are filed. Nothing in the rule intimates that the result should differ depending whether a verdict or a judge's findings are involved. To the contrary, the rule expressly calls for the same treatment.

For the majority opinion to prevail, there would have to be an expansion of, or a deletion in the language of, Rule 63. Either it must be expanded to allow substitution of a new judge for the deceased judge "*before or* after a verdict is returned or findings of fact and conclusions of law are

filed." Or, in the alternative, there must be an excision from the rule of the terminology "after a verdict is returned or findings of fact and conclusions of law are filed." The Rule would then state:

> If by reason of death, sickness or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules [deletion of 15 words], then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties.

The principle requires no elaboration that the function of a panel of the Court, or, indeed, of the Court *en banc*, is to apply the Federal Rules of Civil Procedure as written, and not to amend or modify them. 2 Moore's *Federal Practice* ¶ 1.13[1] ("(T)he provisions of the Rules are to be observed by all.").[1]

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[1] The majority no doubt regard the rule as unfortunate, an oversight by the Congress, calling by its language for a result they deem unacceptable. We have no need to debate that point, although I have my doubts that the rule is an example of unwisdom. Assume there was an oversight. In *State ex rel. Lunsford v. Weber*, 153 W. Va. 544, 547-48, 170 S.E.2d 671, 673 (1969) there was an attempt to substitute one judge for another through a special election during a vacation of the court. The attempt was invalidated and a writ of prohibition granted. West Virginia Rule 63 of the Rules of Civil Procedure repeats *in haec verba* the wording of F. R. Civ. P. 63. The West Virginia court held:

> It is urged by counsel for the respondents that the Rules of Civil Procedure of this Court, adopted in 1960, applicable to trial courts of record in this State, enlarge the powers of special as well as regular judges. Specifically, Rules Nos. 1, 6(c), 63, 77(a), 78, and 81 are relied upon. It is true that these rules do broaden the procedural powers of courts of record of this State having civil jurisdiction but this Court has no authority under the Constitution of this State to fix the time for holding terms of court or to provide the manner in which a special judge may be selected. That authority has been by the Constitution of this State invested in the Legislature only. It may be that it was only due to an oversight that the applicable statutes do not provide for the selection of a special judge in the vacation

The majority seeks to distinguish, on the grounds that they were non-jury cases, *Arrow-Hart, supra,* and the other authorities, all of which construe Rule 63 in a fashion contrary to the result they reach. But, to proceed in that fashion is to encounter several insuperable obstacles. F. R. Civ. P. 2 states that there shall be one form of action. Professor Moore construes it to mean:

> All procedural distinctions between actions at law and suits in equity and in the forms of action and practice and procedure thereof are abolished, and hereafter there shall be only one form of civil action.

2 *Moore, supra,* ¶ 2.02[1]. Nothing in Rule 63 suggests that its consequences are to differ depending on whether the judge's death occurs before the return of a verdict, on the one hand, or before the filing of findings of fact and conclusions of law, on the other. To the contrary, Rule 63 plainly mandates like treatment. *See* 6A Moore's *Federal Practice* (2d ed.) ¶ 59.08[2]:

> The death . . . of a judge during a trial and before a verdict is returned in a jury case or before findings of fact and conclusion are made in a court case will, in the absence of the consent of all parties, normally result in a mistrial. If the disability thereafter occurs, then a successor judge may, pursuant to Rule 63, decide a motion for new trial or other post-verdict motion, if he can properly perform his duty in relation thereto; otherwise he should grant a new trial.

According to the majority, the result they reach is justified by the avoidance of the jettisoning of three weeks of trial, by proper utilization of the services of the jury, the conservation of expenses to the parties and the government, and the promotion of the efficient administration of a busy court.[3]

> of a court but only the Legislature can supply that deficiency, if such it be. This Court cannot amend the pertinent section to achieve that end.

[3] We may assume, for argument's sake that all those characteristics were present, but it is more difficult to conclude, as the

Yet such considerations were present in spades in *Arrow-Hart, supra*, and they were insufficient to persuade the Sixth Circuit to disregard Rule 63. *See* 552 F.2d at 711-12:

> The case was tried before United States District Judge Mac Swinford, sitting without a jury, in 1974, and required 19 trial days and an additional 18 days for depositions. At the end of the testimony, Judge Swinford prescribed a schedule for filing briefs after

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majority has done, that "Judge Murray's decision prejudiced no one." Judge Murray performed a herculean task in preparing himself to take over in the tragic circumstances of Judge Blair's untimely death. But, I submit that the very magnitude of the task imposed on him made a decision by him which prejudiced no one practically impossible. We need not consider the persons whose cases had been scheduled before Judge Murray, and who suffered postponements while he devoted time both to preparation for, and then to conduct of the trial over a period of 2 weeks.

Instead, let me concentrate on the circumstances of the appellant. In a later section of this dissent, I shall set forth why a proper decision on a point favorable to the appellant, Ford Motor Credit Co. (hereafter "Ford Credit") would have led to a directed verdict in its favor (incidentally sparing all the waste of time and duplication of effort which are the cornerstone for the majority's position).

Judge Murray doubtless went flat out in trying to get ready to try, with almost no time for rumination and reflection, the factual aspects which were in dispute between the parties. He was constrained to think almost exclusively in terms of trying the case to a jury, not of the possibility of taking the case away from the jury. So he could not devote sufficient time to correlating the facts he had so hastily to absorb with the collateral issue of whether, taking them in their strongest posture for the plaintiff, they, as a matter of law, made out or failed to make out a ground, for recovery.

Judge Murray is not a timid man, and he would have done right as he saw it whatever awkwardness in the way of consequences may be imagined. Had he perceived that there was no case for the jury, he would, no doubt, have granted a directed verdict. However, over and beyond the probability that he had no adequate time to consider fully the virtues of a solidly valid reason for a finding in Ford Credit's favor at the conclusion of the evidence, he may be excused if he felt an extraordinarily high degree of reluctance to slip out by way of a directed verdict,

the completion of the transcript. After the transcript of approximately 5,000 pages had been completed, but before all the briefs were filed, Judge Swinford died on February 3, 1975, without having made any findings of fact or conclusions of law.

The case was reassigned to District Judge Eugene E. Siler, Jr. The plaintiffs and four of the five defendants filed a motion with Judge Siler urging as follows:

> 1. To decide the case on the transcript of the former trial without necessitating another trial.
>
> 2. If there has to be a second trial, to allow transcripts from the prior trial to be used the same as depositions of witnesses who otherwise qualify, that is, under Rule 32(a)(3), Federal Rules of Civil Procedure, where they either live outside the Eastern District of Kentucky, or reside one hundred miles from the place of holding the trial, or cannot be procured otherwise by the parties.
>
> 3. If a second trial is necessary, to allow the same witnesses to adopt their prior transcribed testimony by reference in accordance with Rule 803(5) or (24), Federal Rules of Evidence, limiting cross-examination to any new matters raised.

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thereby raising the inevitable question in some minds, of whether, in the overwhelming circumstances of Judge Blair's death in midstream, he had rushed to find an easy way out.

Judge Murray, I am confident, did not consciously allow any such factors to influence him. Still, he was denied — and Ford Credit likewise was denied — the long period of time for easy step-by-step familiarization with the case (over 4 years elapsed between institution of the case and commencement of the trial, with a great number of pleadings the consequence of which necessarily was to familiarize the judge assigned the case from the outset) and the gradual piecing of its multiple facets and aspects together, so that he could see it from a proper long-range perspective, rather than from a compressed, necessarily almost unidimensional viewpoint, when, at the close of all the evidence it became necessary, whether for Judge Blair or for Judge Murray, to render a wide ranging decision.

Philip Carey Co., the fifth defendant, refused to agree that Judge Siler decide the case on the transcript of the former trial without necessitating another trial, and insisted that the death of Judge Swinford without having made findings of fact and conclusions of law necessitates a new trial. At a pre-trial conference, the parties indicated that they would expect to use the same witnesses who testified at the prior trial, and that a second trial would be expected to last as long as the first.

552 F.2d at 712:

In a memorandum opinion filed May 6, 1976, Judge Siler said:

> The undersigned Judge is satisfied that he can render judgment on the prior transcript and upon any additional testimony that may be presented, but he feels that he has no discretion in the matter. Since Rule 63 specifies that a new Judge may act where the previous Judge had already made findings of fact and conclusions of law, it follows that if the prior Judge had not made those findings and conclusions, then a new trial is required.

552 F.2d at 712-13:

At the oral argument of this case, this court pointed out to local counsel for Philip Carey that the United States District Court for the Eastern District of Kentucky has only three District Judges with a heavily congested docket; and that it would facilitate the dispatch of judicial business in the district if Philip Carey would join the other parties in agreeing that the case be submitted on the evidence contained in the transcript, with an opportunity for the parties to supplement the record with additional testimony. This court requested that the local attorney for Philip Carey communicate with house counsel for the corporation and ascertain if it would be possible to reach an agreement to that effect. We have been informed by Cincinnati counsel that the request of the court

was submitted to the client, along with a summary of the court's comments, and that Philip Carey has instructed its attorney that he is not authorized to change the position taken by the corporation in the District Court and in this court.

The records of the Administrative Office of the United States Courts show that 2,308 cases, criminal and civil, were filed in the Eastern District of Kentucky during the calendar year 1976, a total of 769 cases per judge, and that the District Court had a backlog of 3,232 civil and criminal cases pending on December 31, 1976.

In the face of this staggering caseload, we are reluctant to hold that District Judge Siler does not have the discretion to dispose of the present case on the basis of the evidence on file, together with any additional competent evidence that the parties may desire to submit.

However, in the absence of unanimous agreement of the parties, and where, as here, there is no oral or written expression of the deceased judge reasonably satisfying the requirements of Rule 52 concerning findings of fact and conclusions of law, we hold that a new trial is required and that Judge Siler was correct in his construction of Rule 63.[3]

[3] *Cf. Burrill v. Shaughnessy*, 9 Fed. Rules Service 918 (N.D. N.Y. 1946), where the jury returned a verdict for the plaintiff, but the judge thereafter died without having disposed of certain reserved questions of law. The court applied Rule 63 to both the jury's verdict and to the outstanding findings of fact and conclusions of law that had not been filed. The jury verdict survived because the judge died after it had been returned. "In this case '. . . a verdict is returned' within the meaning of Rule No. 63." The court therefore recognized the controlling nature of Rule 63 in jury trials. Death of the judge *before* return of verdict certainly would have mandated a new trial. That is made crystal clear by the disposition as to the outstanding findings of fact and conclusions of law: "In the absence of a stipulation, the defendant cannot be required to submit the remaining legal issues to this court for a decision. The defendant is, therefore, entitled to a new trial as to all the issues not determined by the verdict of the jury."

The long and the short of it is that the majority dislikes Rule 63, at least as it affects the instant case, and so would abrogate it. The argument they advance is that the generally wide, and liberally provided discretion of the trial judge, here Judge Murray, should not be disturbed where he elected to continue the trial, even though Judge Blair, who had conducted three weeks of it, died before the taking of evidence was completed and before a verdict was returned. Instances of wide discretion conferred on the district judge are cited in (a) the grant of a mistrial because of "improper voluntary statements of a witness," (b) denial of a mistrial where counsel made an unwarranted appeal to the jury's sympathies and a curative statement by the judge was made, and (c) denial of a mistrial where the judge, in response to a jury's query informed the jury that the matter was not in its bailiwick and not to concern itself about the matter.[4] With respect those cases do not engage Rule 63, and are simply not relevant. The distinction is that no provision of the Federal Rules forecloses a trial judge's exercise of discretion relative to a grant of mistrial for improper witness statements, unprofessional conduct of counsel or a jury's attempt to range outside its area of responsibility. Rule 63, however, forecloses any exercise of discretion to continue a case with a substituted judge where the original judge has died before return of verdict or filing of findings of fact and conclusions of law.

The significance of that consideration is made altogether clear by the very case by which the majority seeks to justify its conclusion that a retrial *de novo* was not mandated. *St. Louis Southwestern Ry. v. Henwood*, 157 F.2d 337 (8th Cir. 1946), *cert. denied*, 330 U.S. 836 (1947),

[4] As to improper voluntary statements, *see Standard Industries, Inc. v. Mobil Oil Corp.*, 475 F.2d 220 (10th Cir. 1973), *cert. denied*, 414 U.S. 829 (1973); as to an unwarranted appeal to sympathy, *see Burger Chef Systems Inc. v. Govro*, 407 F.2d 921 (8th Cir. 1969). *Traders and General Ins. Co. v. Mallitz*, 315 F.2d 171 (5th Cir. 1963) deals with a jury ranging beyond its proper scope.

rehearing denied, 331 U.S. 870 (1947).[5] The district court was considering whether to approve a plan for the reorganization of a railroad debtor. The evidence had been closed and arguments of counsel were being made. All parties had presented arguments in chief except one party to the proceedings appearing *pro se* and except for the debtor. At that point the judge died. Only the party appearing *pro se* objected to the adoption of the record as completed before the deceased judge, and demanded a complete new trial.

The Eighth Circuit concluded, there being no Rule 63 involved, that the discretion of the district court extended so far as to permit the successor to proceed on the record "as it came to him." However, it emphasized that the discretion could be curtailed by specific provision of law. At 157 F.2d at 342, it stated:

> How and by whom is the existence of such necessity to be determined? In some instances, the law speaks through some affirmative legal requirement. Malony v. Adsit, 175 U.S. 281, 20 S. Ct. 115, 44 L. Ed. 163, changed by 31 Stat. 270, 28 U.S.C.A. § 776. In other instances, the successor judge has power, through the exercise of a reviewable judicial discretion, to determine on the situation in which he finds himself.

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[5] By way of an aside, I point out that the *Henwood* case is not authority favoring the majority's position in any event, it being a bankruptcy case. Hence Rule 63 had no role to play insofar as it was concerned. *In Re Schoenfield*, 608 F.2d 930, 933 (2d Cir. 1979). F. R. Civ. P. 81(a)(1).

The majority would make bricks without straw in suggesting that *Henwood* has particularly supporting relevance for its proposition, since, with *Henwood*, because it was a bankruptcy proceeding, "as here, no rule expressly governed the question of substitution." Slip op. at 6. That is a flat assumption of the answer. For the difference is that Rule 63 did not apply in *Henwood*. It does apply in the instant case. The question is whether Rule 63 expressly governed the question of substitution. The answer is that it does govern, and in a way to require a new trial where one of the parties has insisted on proceeding in that way, if death of the judge occurred before "a verdict is returned."

The very example it cited of "some affirmative legal requirement" which would preempt the trial judge's exercise of discretion was a statute requiring that the judge sitting at the trial sign the bill of exceptions. The statute, as the quotation from *Henwood* makes clear, was supplanted by 28 U.S.C.A. § 776. The Advisory Committee on the Federal Rules of Civil Procedure appended a note to Rule 63 stating:

> This rule adapts and extends the provisions of U.S.C.A., Title 28, former § 776 (Bill of exceptions; authentication; signing of by judge) to include all duties to be performed by the judge after verdict or judgment. The statute is therefore superseded.

Thus *Henwood*, the case on which the majority rests its proposition that there is discretion in the trial judge to continue the trial despite death of the presiding judge in the midst thereof, prior to the return of the verdict, notwithstanding the blatantly contrary phraseology of Rule 63, itself asserts that the statutory predecessor of Rule 63 would constrain the exercise of discretion. In effect it says that to contradict the requirement of the statute (and inexorably, therefore, of its extension Rule 63) would amount to an abuse of discretion.[4]

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[4] In support of that conclusion, consider *Girard Trust Bank v. Easton*, 12 N.C. App. 153, 182 S.E.2d 645 (1971), *cert. denied*, 279 N.C. 393, 183 S.E.2d 245 (1971). There the case was originally prepared for trial by a jury, but, in any event, it was tried before a judge. All the evidence was introduced, the hearing was concluded, and the judge announced his answers to each of the special issues which had been prepared by the defendant in anticipation of a jury trial. Those answers revealed the judge's decision to rule in favor of the plaintiff. Counsel were asked to draw up findings of fact and conclusions of law. The judge died without signing the proposed judgment. In § 1A-1, Rule 63 of the General Statutes of North Carolina, the language of F. R. Civ. P. 63 is precisely tracked. The Court of Appeals had no difficulty in recognizing that "after" as used in the phrase "after a verdict is returned or findings of fact and conclusions of law are filed" does not mean "before":

> Plaintiff also argues that the issues, when considered together with the court's answers thereto, constitute suffi-

Even so, argue the majority, the language of Rule 63 only states what can be done when there has been a return of verdict, or a filing of findings of fact and conclusions of law. It does not, they contend, explicitly state what can be done when there has been no return of verdict, no filing of findings of fact and conclusions of law.[7] That approach

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cient findings of fact and conclusions of law to permit a substitute judge to proceed under Rule 63. We do not so find. The issues were intended as nothing more than a guide to assist counsel in preparing findings of fact and conclusions of law which might, or might not, be adopted by the court. The issues are insufficient to form any basis for review and a judgment based upon the issues alone would require a remand for sufficient findings of fact and conclusions of law.

The case is shattering to the argument of the majority that Rule 63 permits substitution in the midst of a jury trial, but not in a judge trial. The judge, by answering the special issues, did all that a jury would have done in returning a verdict. Yet that was insufficient. The language of the rule is unmistakable. We should be governed by it. Substitution of Judge Murray for Judge Blair was not permitted. (*Girard Trust* might well have been decided differently, on the grounds that the initial judge's answering of the special issues amounted to findings of fact and conclusions of law. *See* Annotation, *Power of Successor or Substituted Judge in Civil Case, to Render Decision or Enter Judgment on Testimony Heard by Predecessor*, 22 A.L.R.3d 922, 924 n.3 (1968). *Cf. Makah Indian Tribe v. Moore*, 93 F. Supp. 105 (W.D. Wash. 1950), *reversed on other grounds*, 192 F.2d 224 (9th Cir. 1951). That would not, however, affect the case's relevance here, for in *Ford Credit v. Whalen*, it is indisputable that no verdict had been returned by the time of Judge Blair's demise — two weeks of additional testimony were taken subsequent to his death.)

[7] One should not be misled as to the extent of the rent in the legal fabric which the majority have proposed. They are not simply suggesting a little *casus omissus*, as a consequence of which F. R. Civ. P. 63 supposedly overlooked saying anything about death, sickness or other disability *before* a verdict is returned, leaving it to the discretion of the court, on the grounds that Rule 63 has no application, to fashion the appropriate steps where the judge dies before the verdict has been returned. For, had there been a *casus omissus*, it would manifestly exist as much for judge trials as it does for jury trials. The Rule states:

would disrupt language as a means for communication. The implication that there may not be a substitution to replace a deceased judge and to continue the trial if death comes before return of verdict is inescapable. *See* 7 Moore's *Federal Practice* ¶ 63.05 at p. 63-9; *In re Schoenfield*, 608 F.2d 930, 934 (2d Cir. 1979).

Moreover, the slight vestige of life one can, by assiduous pumping, squeeze into that theory depends, it would seem, on there having been, before adoption of the Federal Rules, a rule generally allowing to a trial court a discretion to substitute another judge at any time, before or after verdict, for a judge who had died.

"If by reason of death . . . a judge . . . is unable to perform the duties to be performed by the court under these rules after a verdict is returned *or* findings of fact and conclusions of law are filed. . . ." (Emphasis supplied).

Consequently, every case that has presented the question (see this Dissenting Opinion, Slip p. 2 and fn. 3 at p. 13), each of which specifically acknowledged that Rule 63 did apply, was, on the majority's approach, adjudicated on a faulty rationale. The same is true for state court decisions where Rule 63 has been adopted as part of the state procedure. Some, conceivably, could have reached the same result through exercise of discretion, independently of the mandate of Rule 63, yet not one of them elected to go that route. Nor could *Arrow-Hart, Inc. v. Philip Carey Co.*, 552 F.2d 711 (6th Cir. 1977), the most recent of the federal decisions, have reached a result in which a new trial would be allowed as a matter of discretion. Both the district judge and the Sixth Circuit expressly stated that they would have preferred to have the case go forward with a substituted judge, but acknowledged that such a route was foreclosed because of Rule 63's mandate.

In short, those cases are not simply distinguishable as "non-jury." On the majority's approach, every one of them must be found to have employed the wrong methodology. Precedent may at times seem to pose an inconvenience. Nevertheless, it is the life blood of our jurisprudence. It is the embodiment of the concept of equal protection, for it insures that what we do to one litigant one day, we do to another litigant on another. Equal protection is what makes our world go round. It is well entrenched precedent, not merely logic, that the majority would sacrifice to pragmatism.

Yet there simply was no such rule. The surprisingly scant authority perhaps reflects the happy infrequency of death occurring to presiding judges during the course of trials.[8] What precedents there are establish that the widely held belief was that death of the judge mandated a fully *de novo* proceeding. Since that was the case, it simply is not plausible or possible to think that the Advisory Committee on the Federal Rules operated in an atmosphere where the idea of resuscitating and continuing a trial, aborted during gestation and prior to delivery, had any currency.

Consider the rule for criminal cases, overhung as such cases have been with problems of double jeopardy. If the first trial could continue under a substitute judge, the manifest necessity for declaring a mistrial and placing the accused in jeopardy a second time would not exist. Yet, "[a]t common law, if in a trial for felony a juror, the judge, or the prisoner becomes incapacitated by illness after the jury are impaneled and sworn in chief, the proper course is to declare a mistrial and begin de novo." 76 Am. Jur. 2d (Trial) § 1092. *See State v. Slorah*, 118 Me. 203, 209, 106 Atl. 768, 771 (1919):

> Certain conditions, if arising in the trial of a case, have come to be well recognized as constituting that "urgent necessity" which will warrant the discharge of a jury, and, if they appear of record, will bar a plea of former jeopardy: . . . (2) illness of the court, a member of the jury, or the respondent. . . .

Cf. Annotation, *Substitution of Judge in Criminal Case*, 83 A.L.R.2d 1032, 1034, 1036 (1962) ("A substitution of judges during the introduction of evidence, over the objection of the accused, has been held to be error.").

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[8] *See In Re Schoenfield, supra*, 608 F.2d at 933:

> The paucity of federal cases involving the mid-trial substitution of judges indicates either that such substitution rarely occurs or that when it does, it does so with the consent of the parties.

There had been general acceptance at least until the time of adoption of F. R. Civ. P. 63 and of F. R. Crim. P. 25(a) in 1966, that the trial *de novo* was, in the absence of the defendant's consent constitutionally mandated. Wright, *Federal Practice and Procedure: Criminal* § 392 (1969):

> In the absence of consent, . . . the death or disability of the judge requires that a mistrial be granted.[9]

Cf. Freeman v. United States, 227 Fed. 732, 759-60 (2d Cir. 1915); *Bailey v. Indiana*, 397 N.E.2d 1024, 1027 (Ind. App. 1979) (criminal trial).

The English attitude should be entitled weight in determining what the rule was at common law, i.e. before the advent of such innovations as F. R. Civ. P. 63. The British authorities support the conclusion that, on Judge Blair's death, a trial *de novo* was required.

In *Coleshill v. Manchester Corp.*, [1928] 1 K.B. 785, a jury trial, three witnesses were called before the presiding judge. He died and the case was resumed 4 days later before the same jury but, necessarily, another judge. That procedure was approved by the trial court "at the urgent request of the parties."[10] Naturally, therefore, on appeal there was no point made by either party as to any impropriety of the procedure. Nevertheless, Scrutton, J. felt it incumbent on him *sua sponte* to observe:

> . . . I think it is a precedent which should not be followed in the future. I doubt whether a judge has any jurisdiction to continue the hearing of a case in which witnesses have been called in court in the course of the trial before the jury and another judge. . . .

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[9] Professor Wright opines that such remains the law despite the adoption of F. R. Crim. P. 25(a), a matter which we have no occasion to pursue.

[10] Ford Credit, it should be remembered, protested being forced to continue before the same jury but with a different judge, and moved for a mistrial.

That observation, if nothing else, provides strong indication that, prior to 1928, in British courts, it was universally accepted that, even with the consent of the parties — and *a fortiori* without — continuance of a jury trial with a substituted judge, upon the death of the one who had commenced the case, was not permitted at common law. No subsequent development in the British courts draws that conclusion into doubt.[11]

It seems to me too pat for the majority to seek to dismiss as irrelevant the consideration that Judge Murray did not see the witnesses testify. Slip op. at 2-3: "This difference is immaterial, for it was the function of the jury, not the trial judge, to assess the credibility of the witnesses." That flat statement ignores the judge's function to comment upon credibility. *See* Supreme Court Standard 107 ". . . the judge may fairly and impartially sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses. . . ." Standard 107 was not incorporated into the Federal Rules of Evidence upon

[11] The English cases subsequent to *Coleshill v. Manchester Corp., supra,* have all involved consent of the parties to substitution of a judge in cases tried non-jury. To an American, the parties' consent would be dispositive. Nevertheless, the course followed is quite different. The cases take care not to contradict Scrutton, J.'s observation. Instead they distinguish it because he was addressing the situation in the context of a jury trial. They thus would take the opposite tack from that of the majority, which has acknowledged that, under the authorities, trial *de novo* is mandated by Rule 63 for a non-jury trial, but would distinguish the authorities on the basis that the instant case involved a jury trial. *In Re British Reinforced Concrete Engineering Co., Ltd.'s Application* (1929) 45 T.L.R. 186; *The Hopemount,* [1943] 75 Lloyd's L. P. 94; *HMS Vanity,* [1946] 79 Lloyd's L. R. 594; *Bolton v. Bolton,* [1949] 2 All E. R. 908 (approving Scrutton, J.'s observation, yet not reversing because "this case is so clear that we should be in danger of doing a grave wrong if we were to send it back" but with a general protest against the procedure of continuing, rather than recommencing *de novo*); *The Forest Lake,* [1968] P. 270, [1966] 3 All E. R. 833, [1966] 2 Lloyd's L. Rep. 421 (distinguishing *Coleshill* "from the present one because that was a case tried not by a judge alone but by a judge and jury.")

the recognition "that the formulation adopted by the Supreme Court [Rule 105], Standard 107 did represent the clear federal law. . . ." "Congress struck it without intending to change the federal practice." 1 Weinstein's *Evidence*, p. 107-2.

How can a judge fully resolve the question of whether such a particular comment on credibility should be made, how can a judge determine whether he should correct, as erroneous, a statement of counsel relating to the demeanor, traits or behavior of a witness, unless he has been present to observe the conduct of the witness? *See Mason v. State*, 26 Oh. C. C. 535 (1904) quoted in Annotation, *Authority of Judge in Respect of Unfinished Business of Another Judge*, 54 A.L.R. 952, 960 (1928):

> Arguments of counsel to the jury should be based upon the evidence, and be restricted to what was proven. Counsel should not be permitted to distort and misstate the evidence, and yet the presiding judge from the record had no knowledge of what the evidence was whatever. *But if we were to assume that the trial judge had read the evidence the result would be the same.* The appearance and demeanor of the witnesses upon the stand are very important factors in weighing evidence, and give counsel not only a great field for argument, but in many cases for misrepresentation and improper denunciation. Did counsel fairly and properly represent the appearance and demeanor of the witnesses upon the stand in their arguments? . . . The duties of the judge who took the place of the previous one required judgment in all these matters, and it seems to us that, where judgment is required in the performance of the duties of the trial judge in reference to the facts, one judge cannot be substituted for another during the trial, although under the law the judge so acting under such change may have the same jurisdiction and power as the disabled judge.

(Emphasis supplied.)

Moreover, the judge has responsibilities requiring full familiarity with all the evidence irrespective of the assignment to the jury of the duty to find the facts. The judge must also make a factual finding as to whether there is sufficient evidence to submit a case, or one or more aspect of it to the jury. Such findings were required here by the motion for directed verdict, and, as already pointed out, Judge Murray's hurried attempts to indoctrinate himself were no substitute for the full familiarization, ranging over a period of over 4 years, which the defendant would have received had Judge Blair not died. The difference in the two radically different constructs: one a careful, measured approach to the numerous knotty legal problems by Judge Blair, the other an inescapably nasty treatment by Judge Murray,[12] with little or no opportunity for reflection and absorption reveals that, on any comparative basis, Ford Credit did not receive as fair a trial as it would have had if Judge Blair had not died.

Considerations like these have recently led the First Circuit to apply Rule 63 by analogy to require a trial *de novo*, even though the case arose in bankruptcy, and Rule 63, accordingly was not controlling. *In Re Schoenfield*, 608 F.2d 930, 933 (1st Cir. 1979).

> We have described in some detail these Second Circuit decisions involving the substitution of judges in order to make clear that although the situation is rare, the legal principle guiding this Court's approach to such cases is basic and familiar. That principle, simply stated, is that the factfinder who is given the opportunity to observe witnesses as they testify is in a better position to make factual findings based on that evidence than is the factfinder who is restricted to a written record of the same testimony. Even before the study of "body language" came into vogue, it was recognized that transcripts of testimonial evidence — which cannot capture the sweaty brow, the shifty eye,

[12] Due, it hardly needs observing, to no failure on his part to familiarize himself and prepare himself, as best he could under the stressful and distressful circumstances.

> the quavering voice — never fully reflect what was communicated by the testifying witness.

608 F.2d at 935.

The question which confronts us relates to a civil trial, not a criminal one. We consequently are not directly concerned with what the result would be if the case were governed, not by F. R. Civ. P. 63, but by F. R. Crim. P. 25. Nevertheless, the procedure in criminal cases affords instructive analogies and indicates as to how to resolve the issue in a civil case.

In the Federal Rules of Criminal Procedure, Rule 25 deals with the topic "Judge; Disability." Prior to an amendment in 1966, what is now Rule 25(b) was all of Rule 25. It, with minor language variations of no significance to the point with which we are concerned, tracked the language of F. R. Civ. P. 63 and provided that if:

> by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge . . . may perform those duties.

Thus, before the 1966 amendment to the Criminal Rules, the same arguments already advanced in this dissent as to civil cases could be tellingly made that substitution of a new judge to replace one who had died was not possible when the judge's death had occurred prior to rendition of the jury verdict.

That argument, strong as it already was, became substantially even stronger when, in 1966, a new section (a) was added to F. R. Crim. P. 25 providing that substitution of a judge might occur *during* trial. One must ask why, if the rule so provided all along, the amendment to introduce F. R. Crim. P. 25(a) was called for. And if it was in fact necessary, the failure to make a comparable amendment to the Civil Rules only reinforces a conclusion that proceeding over the objection of a party when the

judge has died in the midst of a civil proceeding is not permitted.

An appellee has suggested in its brief that it "is illogical if a district judge, because of death, may be replaced during the course of a criminal trial, where a defendant's liberty is at stake" yet, "such replacement would be impermissible in a civil trial where mere property hangs in the balance." However, a criminal trial, unlike a civil one, engages the serious hardships of jeopardy for a defendant. Death of the presiding judge while the case is in progress would almost certainly constitute "manifest necessity" permitting a retrial if no procedure for substitution existed. *See, e.g., State v. Slorah, supra.* But because a procedure may be legal does not mean that it is incapable of improvement. The purpose of F. R. Crim. P. 25(a) may have principally been to allow a defendant to avoid the unhappy situation where he would be forced to stand trial twice, yet not constitutionally have been subjected to double jeopardy. He was afforded the opportunity to go forward with a substituted judge. No similar reason, of course, exists in a trial on the civil side of the court. Hence amendment of the criminal rule without a corresponding amendment of the civil rule was altogether logical.

Simply and summarily put, a trial tried partly before one judge, partly before another, just cannot afford the same scope for understanding to the second judge which one judge hearing the entire trial would have. The majority asserts that "pragmatism is sometimes a surer guide than logic." Inviting as that sounds, it translates, in the instant case, to "If you prefer a result, ignore the language which precludes it." In effect, the majority says to Ford Credit: "You rely at your peril on Rules, for they may mean the opposite of what they say."

The proper procedure to attain the result preferred by the majority is to amend the Federal Rules. It is not to assign a patently unsupportable intendment to the Rules as they now stand. Ohio was faced with the exact same situation. Prior to July 1, 1972, Ohio's Rule of Civil

Procedure 63 fully adopted F. R. Civ. P. 63, specifically including the phrase "after a verdict is returned or findings of fact and conclusions of law are filed." A Staff Note on Ohio Rule 63 as it then stood, Page's Ohio Rev. Code Ann., Civil Rules vol., stated:

> Note that the rule is a rule of ministerial convenience; that is, one judge may not replace another judge during the middle of the actual trial; the replacement of the judge is permissible under the rule only after the findings of fact and conclusions of law have been filed or the jury verdict has been returned.

Ohio did not seek by judicial decision to abrogate Rule 63, whose meaning was pellucid. Instead, it did what was required and amended the rule specifically to permit substitution during a jury trial. *Welsh v. Brown-Graves Lumber Co.*, 58 Oh. App. 2d 49, 389 N.E.2d 514 (1978). The Staff Note on the change observed that "Rule 63, governing replacement of a disabled judge during the course of a civil action, has been substantially amended by the addition of a subdivision (A)." It simply does not lie in our power, as a federal appeals court, to effect, in the course of adjudicating a case, a substantial amendment to the Federal Rules of Civil Procedure.

Thus, I dissent from the failure to direct a full trial *de novo*.

II.

However, that question properly should not even have been presented to us, for the district court erred in not granting Ford Credit's motion for a directed verdict, or motion for summary judgment because of the failure of Towson Associates Limited Partnership ("the Limited Partnership") even to make efforts to complete the first floor and the penthouse floor.

The trial judge put to the jury the issue of whether "from all the evidence and the conduct of the parties" "the first floor and penthouse units were not to be completed

until sold." It added that if, contractually, Ford Credit was entitled to expect completion by the critical date of September 2, 1975, it would be justified in not funding "if" the state of incompletion was such as to significantly affect its security and completion could not be had in a reasonable time." There was, however, simply no sufficient evidence to support a factual conclusion that Ford Credit, unmistakably having secured an undertaking of completion by September 2, 1975,[13] ever modified it to permit delay of the first floor and penthouse items until sold. Moreover, in the circumstances of unilateral action by the Limited Partnership to abandon any efforts or pretense at completion of the first floor and penthouse, Ford Credit was freed of any obligation to fund once September 2, 1975 passed, and was not obliged to allow a reasonable extension of time for completion.

Perhaps Polonius knew whereof he spoke in advising his son to steer clear of borrowing and of lending. They have brought the participants in the case before us to a pretty pass.

Although the Limited Partnership agreed to the condition precedent contained in the take-out loan commitment from Ford Credit that all buildings and improvements shall be diligently prosecuted to completion in accordance with plans and specifications therefor, and although the plans and specifications indicated details for finishing the first floor and penthouse of the condominium building, nevertheless, from the very outset, from a time prior to the execution of the take-out loan commitment, the Limited Partnership had no intention of completing the first floor and penthouse and, in fact, did not complete them.

The Limited Partnership has contended that Ford Credit understood, approved, and consented to the intentions of

[13] September 1, 1975 was Labor Day. The parties, accordingly, equated the date to September 2, 1975. It makes no difference as to the outcome of the case and, whether September 1 or September 2 is referred to, I treat them as having the same significance.

the Limited Partnership only to rough in, not to complete, the first floor and penthouse. Yet, as to that, the following matters developed by the record are most perplexing:

1. There is simply no place in the Joint Appendix where such consent by Ford Credit is testified to or otherwise established. The closest that the record comes was the testimony of Cornelius M. Whalen, the general partner of the Limited Partnership, that it made a decision "concerning the use of the first floor" before the drawings were even started and that he had a discussion in depth "concerning the professional space on the first floor" with Ford Credit at the time an application for a take-out loan commitment was first made. Cornelius M. Whalen also stated that he made "the decision concerning the penthouse units," that it was made "before the drawings were even started," and that he had discussions "concerning what you were going to do up in the penthouse" with Ford Credit prior to the application for the take-out loan commitment. It is remarkable that the testimony, while constituting evidence that there were discussions with Ford Credit about the professional space on the first floor and about what the Limited Partnership was going to do in the penthouse, never established that discussions "concerning the professional space on the first floor" and "what you were going to do up in the penthouse" ever touched on the matter of leaving those two floors incomplete.

2. The perhaps calculated imprecision on that subject in the testimony may well be explained by the fact that it dealt with discussions *prior* to the execution of the take-out loan commitment on February 14, 1973. The fully integrated documents providing the take-out commitment called for completion of "all buildings and improvements in accordance with plans and specifications therefor," and the plans and specifications did not exempt from the completion requirement the first floor and penthouse. The provisions contradicted what the Limited Partnership now asserts was its intention all along.

The doctrine of integration[14] probably would have rendered the evidence inadmissible if it had become any more explicit. Just because it was inexplicit, however, it fails to mount up to the necessary quantum of proof to establish that Ford Credit, despite the language to the contrary in the take-out loan commitment, nevertheless, consented to noncompletion of the first floor and penthouse. It is not amiss to point out that no claim for reformation of the commitment document was ever sought by the Limited Partnership.

3. In about July 1975, which is the earliest date for which there is evidence that it was brought to Ford Credit's attention that the Limited Partnership was making no effort to complete the first floor and penthouse by September 1, 1975, Ford Credit immediately and unequivocally replied that it would insist on completion in accordance with the take-out commitment language. We may discount perhaps the importance of testimony as to the behavior of Ford Credit in view of the self-interest of Ford Credit at a time when the market had gravely deteriorated. What is harder, to the point of impossibility, to discount, however, is the response of the Limited Partnership. It did not as one would expect, if there were any substance to the contention that Ford Credit had indeed consented to noncompletion of the first floor and penthouse, write a letter reminding Ford Credit that it had consented. Instead the Limited Partnership simply wrote "We cannot have all units completed prior to settlement. Further, if you demand they be finished I would not know how to comply."

Hence, on the record as it has been provided for us, summary judgment apparently should have been granted in favor of Ford Credit.

[14] *See Katz v. Pratt Street Realty Co.*, 257 Md. 103, 262 A.2d 540 (1970) (language of Memorandum, which was an integration of negotiations leading to option contract for the purchase of realty, was clear and unambiguous so that extrinsic evidence of parties' intentions was inadmissible).

I turn now to my reasons for saying that it appears that the Limited Partnership, by deliberately leaving unfinished the first floor and penthouse, indisputably failed to meet a condition precedent to the take-out commitment and, therefore, should have been found, as a matter of law, not to have been entitled to have Ford Credit make the loan.

The Limited Partnership, of which Cornelius M. Whalen was the sole general partner, was organized in May 1972 to develop 24 parcels of land in Towson, Maryland comprising in all approximately 6.66 acres. The particular project engaging our attention was the erection of a high-rise condominium on 1.66 acres.

On February 14, 1973, the Limited Partnership completed arrangements for a standby commitment on the part of Ford Credit to "take out" a construction loan on the project up to a maximum of $9,750,000.[18] Conditions precedent to the right of the Limited Partnership to take down the funds included "in no event later than March 1, 1975":

> All buildings and improvements on the Property (including grading, landscaping, streets, walks and drives, both on-site and off-site and both public and private) shall be completed in accordance with plans and specifications therefor (and change orders affecting the same) approved in writing by Ford Credit, Borrower and the construction lender, if any.

That paragraph of the terms and conditions pertaining to the take-out loan commitment also provided:

> Three copies of such plans and specifications and change orders shall be delivered to Ford Credit as soon as practicable, and shall indicate by endorse-

[18] The Limited Partnership was not contractually obliged to take down all or any part of the Ford Credit loan commitment. Only if the Limited Partnership did so would the option from Ford Credit be converted to a loan contract. For the Limited Partnership to put itself in a position to take down the loan, however, it had first to meet the conditions precedent.

ment thereon that they have been approved by Borrower and any construction lender. *All construction shall be of good quality, commenced as soon as possible and diligently prosecuted to completion.* Inspections may be made by Ford Credit, or an independent architect retained by Ford Credit and compensated by Borrower, at any and all times during construction and after completion thereof, and satisfactory certificates of any such independent architect shall be submitted to Ford Credit at least quarterly. Ford Credit shall be furnished with evidence satisfactory to it that all mechanics, materialmen and other lien claimants have been paid or that adequate provision has been made therefor, and that there are no mechanics' or other liens or judgments on the Property.

On August 22, 1973, Ford Credit approved the plans and specifications.

Armed with those essential documents, the Limited Partnership, on August 28, 1973, entered a construction loan agreement with Equibank (N.A.) of Pittsburgh, Pennsylvania ("Equibank"), providing for an aggregate advance not in excess of $9.75 million to meet the cost of construction of the condominium project.

Essentially contemporaneously, on August 24, 1973, the Limited Partnership, employing the American Institute of Architects Standard Form of Agreement between Owner and Contractor, made Robert Whalen Company, Inc. ("Builder") the general contractor.[16] By Article 2 of that agreement the Builder obliged itself to "perform *all the work* required by the Contract Documents for TOWSON

[16] The Joppa Road Joint Venture (the "Venture") was a general partnership, whose partners were Cornelius M. Whalen, Robert J. Whalen, principal of the corporation which built the subject condominium, Joseph A. Lynott, Jr., and Edward A. Griffith. The Venture was the assignee of a portion of Cornelius M. Whalen's general partnership interest in the Limited Partnership pursuant to a Subventure Agreement under the Limited Partnership Agreement.

CENTER APARTMENTS, TOWSON, MARYLAND." (Emphasis added.) Article 4 in its entirety read:

ARTICLE 4

TIME OF COMMENCEMENT AND COMPLETION

The Work to be performed under this Contract shall be commenced 5 SEPTEMBER 1973 and completed 1 FEBRUARY 1975

(Here insert any special provisions for liquidated damages relating to failure to complete on time.)

No special provisions were inserted. Article 6 stated:

ARTICLE 6

PROGRESS PAYMENTS

Based upon Applications for Payment submitted to the Architect by the Contractor and Certificates for Payment issued by the Architect, the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided in the Conditions of the Contract as follows:

On or about the 10th day of each month 90 per cent of the proportion of the Contract Sum properly allocable to labor, materials and equipment incorporated in the Work and 90 per cent of the portion of the Contract Sum properly allocable to materials and equipment suitably stored at the site or at some other location agreed upon in writing by the parties, up to the 25th day of that month, less the aggregate of previous payments in each case; and upon Substantial Completion of the entire Work, a sum sufficient to increase the total payments to 100 percent of the Contract Sum, less such retainages as the Architect shall determine for all incomplete Work and unsettled claims.

(Here insert any provisions made for limiting or reducing the amount retained after the Work reaches a certain stage of completion.)

Again, no insertions were made.

On April 10, 1973, the commitment from Ford Credit to the Limited Partnership had been amended, granting the Limited Partnership the right, upon payment of an additional fee, to extend the expiration date of its option from Ford Credit until September 1, 1975. At that time, Ford Credit explicitly provided that, except for the amendment, "all terms and conditions of the Commitment are unchanged and remain in full force and effect." On January 21, 1975, the Limited Partnership exercised its right to extend.

In the period following August 1973 Distasio & Van Buren, a firm of consulting architects chosen by Equibank, the construction lender, and by Ford Credit, also gave its approval to the plans and specifications. In both the plans approved by Ford and the plans approved by Distasio & VanBuren, it was clearly provided that the first floor and penthouse should be completed.[17]

[17] Cornelius M. Whalen testified:

CORNELIUS M. WHALEN:

A. IT IS A MEMO FROM ME TO THE PROJECT MANAGER, MR. LYNOTT.

Q. COULD YOU READ THE FIRST PARAGRAPH TO THE JURY.

A. "AS YOU KNOW, YOUR CONTRACT REQUIRES A CONSTRUCTION OF NINE TYPICAL UNITS ON THE PENTHOUSE FLOOR. YOU ARE ALSO REQUIRED TO CONSTRUCT SEVEN TYPICAL UNITS ON THE GROUND FLOOR."

Q. ALL RIGHT. NOW, HOW WAS THAT REQUIRED?

A. BY REFERENCE ON THE DRAWINGS.

. . . .

Q. I DIRECT YOUR ATTENTION TO PAGE 183 AND 184 OF YOUR DEPOSITION.

"QUESTION: DO THE PLANS AND SPECIFICATIONS CALL FOR THE FIRST FLOOR IN [sic, read AND] THE PENTHOUSE TO BE COMPLETED?

"ANSWER: YES, SIR."

DO YOU REMEMBER TESTIFYING TO THAT?

A. YES.

Q. IS THAT ACCURATE?

A. NO. WE ARE NOT REFERRING TO THEM AT THE TIME. THE CONTRACT CALLED FOR IT AND THE

As time marched on toward the crucial September 2, 1975 date, construction progressed to a point where the building approached completion. There was, however, one important exception. The projected condominium building envisaged development of the first floor for professional office purposes and the 27th or penthouse floor for luxury

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PLANS CALLED FOR IT. TO THE EXTENT THEY DID, IF YOU ARE TALKING ABOUT THE REFINEMENT, NO, YOU DID NOT GET INTO THAT.

Q. THE DEPOSITION TAKEN NOVEMBER 21, 1977, WAS IT ACCURATE AT THAT POINT IN TIME?

A. NO, NO MORE ACCURATE THAN THAT. IT IS GENERALLY ACCURATE. THE CONTRACTOR WAS REQUIRED TO DO THAT IF WE ORDERED HIM TO DO SO. IT HAS NOTHING TO DO WITH OUR DECISION NOT TO DO IT.

. . . .

Q. LET ME ASK YOU, "SO THE ORIGINAL PLANS AND SPECS SHOWED NINE UNITS UP THERE — 165 — SO THE ORIGINAL PLANS AND SPECS SHOWED NINE UNITS UP THERE?

"ANSWER: RIGHT."

TAKE 183 AND 184: "DO THE PLANS AND SPECIFICATIONS CALL FOR THE FIRST FLOOR IN [sic, read AND] THE PENTHOUSE TO BE COMPLETED?

"ANSWER: YES, SIR."

Page 166.

"QUESTION: AND UNDER THE PLANS AND SPECIFICATIONS THEY WERE REQUIRED TO BE COMPLETED?

"ANSWER: YES."

DID YOU GIVE TESTIMONY ANYWHERE IN THIS DEPOSITION DIFFERENTLY?

A. NO, BUT THAT TESTIMONY IS NOT INCONSISTENT WITH OUR POSITION FROM THE BEGINNING. I DIDN'T REVIEW THE PLANS AND SPECS, THE DOCUMENTS THEN, THAT WAS TWO YEARS LATER. I KNEW THE CONTRACTOR WAS REQUIRED TO FINISH, AND THAT IS WHAT I WAS ATTEMPTING TO TELL YOU.

* * *

residences. Except for a maximum of 8 units[18] which might be dedicated to special office purposes, all units in the Towson Center Apartments were to be used solely as single family residences.

The plans and specifications approved by the parties indicated completion of the first floor and penthouse as if they were typical floors. The parties noted on the plans that such completion of the penthouse floor was indicated "for pricing purposes only," but that only meant, of course, that substitution of other plans for completion was contemplated, not that there was complete abrogation of the duty to complete.[19]

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[18] It appears that, actually, development plans as they evolved contemplated only 7.

[19] When one examines the plans endorsed by the parties and accepted by all as governing the condition precedent that there be diligent prosecution to completion of all buildings in accordance with plans and specifications, one first must turn to a drawing entitled Typical Floor Plan (2nd through 26th floor). The plan shows the apartments filled in and finished (9 to a floor). There is no drawing of the 27th or penthouse level floor, but the Typical Floor Plan drawing contains the following note:

> *CONTRACTOR NOTE:*
> *FOR PRICING PURPOSES ONLY*
> 27th floor (penthouse level) is to be considered as a typical floor with the following exception:
> 1. Sprayed accoustic (sic) plaster ceiling to be applied on MTL. Lath in Susp. Grid System.

Nothing appears in the plans conveying the thought that there was no duty to complete the 27th floor. The most that is deducible from the contractor note, combined with the frequent reference to the penthouse level as a luxury apartment area, is that some difference in partitioning and related matters to permit increases in apartment size was contemplated, and that substitution would, therefore, be necessary. However, *substitution* of work does not equate to not doing the work at all. Manifestly, the parties contemplated that, as was the case for the 2nd floor through the 26th floor, cost computations calculated on the assumption of the completion of the 2nd floor through the 26th floor would also be made for the penthouse level.

As for the 1st floor, the plans show a finished layout including 7 apartments. Again, installation of partitioning and other

The Limited Partnership unilaterally determined not to complete the first floor and penthouse areas, apparently without seeking or obtaining the consent of Ford Credit. The asserted justification was that it was "standard practice" or a "field understanding" that space designed for professional and penthouse use would remain incomplete until sold and custom-designed by the purchaser.

The Limited Partnership in July and August of 1975 stated to Ford Credit that it would not seek to complete the first floor and penthouse pending the working out of architectual design with the tenants and prospective

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finishing details are shown. Nothing in the plans is capable of an interpretation to the effect that the Limited Partnership was excused, for purposes of meeting the condition precedent to the loan from Ford Credit, from completion of the 1st floor.

Subsequently, it appears that regulations of Baltimore County required that, in lieu of residential apartments, the 1st floor would have to be developed for professional, commercial (office) use. Evidence in the record indicates that the Limited Partnership so informed Ford Credit, which apparently agreed to the substitution of office for apartment development on the 1st floor. No record evidence, however, appears indicating that, in lieu of substitution and completion, the Limited Partnership was entirely excused from completion of the 1st floor in order to satisfy the condition precedent.

Apparently concerned about the consequence of the failure to complete the 1st floor and penthouse, Cornelius M. Whalen testified, as the condition precedent compelled him to testify, that "all the apartments to be constructed included the entire building." When it was pointed out to him that a certificate of occupancy covering the entire building made specific exception to the first floor and top floor, Whalen's answer was that there was nevertheless a certificate of occupancy for the entire building because the first floor and penthouse were not part of the building. His rationale was that the plan called merely for a building shell and that only the shell and not the individual units comprised the building. His testimony reached the limit that it would have sufficed for the Limited Partnership to have erected the shell with none of the apartments finished, without adversely affecting its entitlement to a certificate of occupancy. The testimony, taken for the point with which we are concerned, does not, on examination and reflection, provide a satisfactory or substantial basis for a jury finding that, on the issue of entitlement to the take-out loan, the building was "completed."

tenants. Ford Credit's response was simply that the Limited Partnership should adhere to the requirements of the take-out commitment. Its representative told Whalen, the general partner of the Limited Partnership, that "I should get them finished; that is all."[20]

Distasio & VanBuren gave a certificate on August 28, 1975, no more than five days prior to the last date by which all conditions precedent had to be satisfied for the take-out commitment to be enforceable. The certificate stated that "the project is complete, substantially in accordance with the Plans and Specifications . . . , excepting and excluding certain areas which are subject to tenant improvements." Also on August 28, 1975, Distasio & VanBuren certified that it would "cost approximately $120,250.00 to complete the tenant improvement areas in accordance with the plans and specifications." The figure of $120,250.00 was exclusive of the cost of carpeting individual apartments, estimated to be $169,000.00.

On August 31, 1975, one day prior to the expiration date, Mr. Elliott Gitlin, who had been retained by the Limited Partnership to act as the supervisory architect, certified that the building was "substantially completed with the exception of the penthouse and plaza levels." In an August 29, 1975 certificate Gitlin opined: "The penthouse and plaza level tenant space is not complete." Indeed, the Limited Partnership makes no contention that the first floor and penthouse were complete, stating flatly in its brief, "it was obvious no effort was being made to complete these areas."

[20] On July 31, 1975 Ford Credit responded affirmatively to the request of the Limited Partnership to "substitute" an exhibit to the plans and specifications which "facilitate[d] identification of the penthouse units." Ford Credit explicitly stated:

> All other terms of the Commitment remain unchanged, including completion requirements in accordance with previously approved plans and specifications. You are aware that we have not approved changes to plans and specifications, particularly changes relating to the first and top floors.

It is instructive that, with respect to carpeting of each of the units in the project, it was deferred, not completed in accordance with the plans and specifications. The reasons were the same as those advanced for not completing the first floor and penthouse. Deferral would allow choice by the tenant. The Limited Partnership did not, however, in striking contrast to its behavior on noncompletion of the first floor and penthouse, proceed without seeking Equibank's and Ford Credit's agreement, in advance, that the carpeting was not going to be part of the construction loan (in the case of Equibank) or the commitment (in the case of Ford Credit). To the contrary, Cornelius M. Whalen testified that Ford Credit was approached and agreed not to require completion of carpeting "prior even to their commitment." Furthermore, the plans and specifications clearly remove carpeting from the project. See Plaintiff's Exhibit 429, at p. 9.68-1: "All carpeting indicated on drawings in [sic, read 'is'] N.I.C. (Not in Contract)."

When September 2, 1975 came, Ford Credit stood by its asserted rights and refused to take out the construction loan on the grounds that the condition precedent to its doing so, "completion," had not occurred. On December 10, 1975, suit was instituted in the United States District Court for the District of Maryland with diversity as the jurisdictional predicate.

Trial commenced on March 31, 1980 before Judge C. Stanley Blair and a jury. After an interruption of 18 days, from April 20 until May 8 occasioned by Judge Blair's death, trial resumed on May 8, 1980. The jury verdict in favor of the Limited Partnership in the amount of $3,371,000 was returned on May 22, 1980. Judge Murray calculated the interest at $923,746, making the aggregate of the judgment $4,294,746.

Turning to a resolution of the problems posed by those facts, we find ourselves engaged in the ascertainment of meanings ascribed to words by the parties in a rather fluid if not unstable set of circumstances. In committing itself to

the owner to be the take-out lender, Ford Credit made it a condition precedent that the building be "completed" by the date originally agreed on of March 1, 1975, subsequently by amendment changed to September 1, 1975.

In addressing the meaning assigned by the parties to "completed" we may not properly deal with the matter as an arithmetical exercise. We cannot simply say that a building is "completed" when it is totally and fully finished in every respect and detail, and "incomplete" otherwise. The linguistic simplicity of such an approach has its appeal. However, the world in which we live and in which documents of the type here under consideration are drawn is a real, not merely a linguistic, world. Those engaged in large business undertakings (such as the multi-million dollar enterprise before us) obviously do not contemplate such a construction of "completed." They recognize that a single broken window pane, or light bulbs which do not operate, a final coat of paint that has not been applied, leaks, or perhaps an elevator whose full functioning is still interrupted by mysterious kinks which the experts have not yet succeeded in eliminating[21] do not prohibit a description of the building as "complete."[22]

Language, it must be remembered, is our servant, designed to express what we mean, not a master imposing meanings which we have not intended.

At the same time, in transactions such as this, it is important to bear in mind that the take-out lender, back

[21] These examples are exactly that. There are manifestly numerous other possibilities, not uncommonly referred to as "punch-list" items.

[22] Because in addressing the case we have encountered the word "completion" in various circumstances with a variety of meanings assigned to it, and because we must choose some term if we are to express ourselves with clarity, I have elected to employ the term "functional completion," in contra-distinction to full, or 100%, completion, to identify the state which the take-out lender here, and generally in such cases, contemplates when it signs a contract calling for "completion" as a condition precedent to the making of the loan.

from the very outset before construction has even started,[23] has as an objective the avoidance of involvement in the building process. It does not want to make its loan while work is still in progress with all the potential hassles and uncertainties inherent in associations with the building trades. The lender recognizes that in any construction undertaking a point is reached where the matters remaining to put the building in a state of total completion[24] are

[23] At that incipient stage, no one can know what gremlins will lurk, what unforeseen complications will arise. The attitude of the parties is that nothing will fail to be complete by the date set "if we can help it," — "and we will do everything in our power to bring about a completed building." For that reason, should the question arise at an early stage as to what "completed" means, the courts generally attribute the linguistically pure meaning of "fully completed" or "totally completed." *See Della Ratta, Inc. v. American Better Community Developers, Inc.*, 38 Md. App. 119, 136-37, 380 A.2d 627, 638 (1977):

> Under no circumstances would the substantial performance doctrine apply here. Since the contract was wholly executory, no forfeiture was involved. Full compliance, therefore, with the express condition precedent was necessary. To hold, furthermore, that the footings permit was a substantial performance of the express condition precedent to Della Ratta's performance and that substantial performance of such a condition is sufficient would be to frustrate the intention of the parties and the clear purpose of the provision in the contract.

The present case, however, arises at the other end of the line, where the interpretation has shifted, to account for realities, from "fully complete" to "functionally complete."

[24] In projects of a complexity equal to that of the building with which we are concerned, it may be doubted that "total completion" in an absolutely perfect sense is ever attained. *Cf. Whalen v. Ford Motor Credit Co.*, 475 F. Supp. 537, 542 (D. Md. 1979) where Judge Blair at the summary judgment stage in the instant case rejected an argument that the condition precedent required 100% completion:

> Ford Credit's position that full and exact completion of a large construction project such as this one is required as a condition precedent to its obligations under the commitment is somewhat unreasonable. If that were the case, no borrower in circumstances such as these could rely on the commitment because of the immense difficulties present in

trivial and so little interruptive of the functioning of the project that they may be disregarded, and the building recognized to be "complete."

However, recognizing that reality of life, still the permanent lender is entitled to expect and, indeed, genuinely does expect that the owner and builder will strive to the utmost to achieve full completion. That is why the loan commitment requires that construction be "diligently prosecuted to completion." The lender understands that the builder and owner will be excused where they have utilized every reasonable means to bring matters to completion but have been unable in a perfect sense to do so because of matters beyond their control, i.e., the items that fall into the "this is not a perfect world" category.

The case on which the Limited Partnership principally relies, *St. Paul at Chase Corp. v. Manufacturers Life Ins. Co.*, 262 Md. 192, 278 A.2d 12 (1971), *cert. denied*, 404 U.S. 857 (1971), fully illustrates the point. The parties there conditioned the take-out loan on "satisfactory completion." As I have already indicated, the condition of "completion" imposed by Ford Credit is the same as "satisfactory completion," and does not mean 100% completion.[25] The crucial distinction between that case and the one presented to us was the finding by the trial court there, adopted by the Maryland Court of Appeals:

> Now in the first quotation it is stated that 'performance accompanied by good faith is all the law requires', and I don't think that anyone can say that St. Paul and Williams did not operate in good faith.

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bringing, by a specific date, a complex project to the state of 100% completion without a single item being left unfinished. It is not surprising that Ford Credit has been unable to cite any case in which a court has found that a loan commitment contained such a requirement.

[25] A contract requirement that performance be 100% imposes on each party knowledge of the "necessity for 'dotting its i's and crossing its t's.'" *S & S Building Corp. v. Fidelity Storage Corp.*, 270 Md. 184, 188-89, 310 A.2d 778, 781 (1973).

> They did everything possible to push for the completion of this project by the 7th of March, 1966.

Id., 262 Md. at 229, 278 A.2d at 30.

Elsewhere the opinion points out that the items asserted to show a lack of satisfactory completion were principally "nit-picking." *Id.* 262 Md. at 213, 278 A.2d at 23. Only one item had any substance, namely leaking on the 22nd and 23rd floor. It may have been attributable to a bad blizzard, certainly not of the owner's making. And if not, no single iota of evidence pointed to any indifference or failure to seek to remedy the leak. The court's finding as indicated in the prior paragraph was that every effort to complete was made.[*]

The deliberate decision of the Limited Partnership not even to try and meet the condition precedent, insofar as the first floor and penthouse were concerned, is vitally important for another reason. The Limited Partnership expectably cries forfeiture because it lost the project when the take-out loan was not forthcoming. *E.g. St. Paul at Chase, supra,* 262 Md. at 232, 278 A.2d at 31:

> In determining the answer to this question, it is necessary that the Court bear in mind that basically, the law frowns on forfeitures of any kind. That's what the effect of this cancellation was — all that had been

[*] Commercial space on the first floor at St. Paul at Chase was found by the court not to have been complete on the operative date for take-out purposes. However, nothing was said about the extent of the incompleteness, and the take-out lender conceded that the matter would not have been asserted by it as a grounds for refusing to make the loan. *Id.* 262 Md. at 228, 278 A.2d at 30.

Such an action by one take-out lender would not, of course, establish that no other lender at any time could complain of incompleteness of the first floor. Moreover, in *St. Paul at Chase* no failure to complete the top floor occurred. Most important, and indeed of controlling significance, is the fact that the owner strove for completion of the first floor. There was nothing to suggest a deliberate, unilateral decision not to finish, the controlling distinction insofar as the Limited Partnership here is concerned.

> expended on that building at the date of cancellation was lost, so far as St. Paul was concerned.

Transactions, as here, are often gigantic in amount. Courts are properly not disposed to sanction forfeiture because of an unforeseen complication or complications — its or their incompleteness trivial, in contrast to the project as a whole and to its advanced state of completion — on the critical take-out commitment date, for difficulties *not of the owner's own making*. Risk as to such matters is assessed as never having been intended by the parties to fall exclusively on the owner.

However, while that may excuse the Limited Partnership for a number of incompletions in the Towson project (arguably all save the first floor and penthouse), it does not for the deliberate, conscious decision not even to try to complete the first floor and penthouse. There incompleteness was distinctly *of the owner's own making*. A frank concession was made: "It was obvious no effort was being made to complete these areas." Therefore, the condition precedent was not met. By the terms of the agreement between the Limited Partnership and Ford Credit, the latter was, consequently, not obligated to make the take-out loan.

The equitable objective of relieving someone from a forfeiture does not extend so far as to protect against a knowing, deliberate failure to comply with an express condition precedent, on compliance with which performance by the other party depends. *City Bank of Baltimore v. Smith*, 3 Gill & J. 265, 380-81 (Md. 1831):

> But it has been strongly urged, that the assignees of the mortgage took it subject to all the equity of the mortgagor as against the mortgagee; and that this being the case of a condition, equity will relieve against the effects of the nonperformance of it, by giving to the defendant the benefit of the prizes, though not demanded according to the condition. Equity will relieve against penalties and forfeitures, and where the matter lies in compensation, whether

> the condition be subsequent or precedent; as if it be for the payment of a certain sum of money at a certain day, and the payment at a subsequent day will be a compensation for the non-performance, the intent being to secure the payment of the money. But notwithstanding it will, in many cases, interpose to prevent the divesting an estate, it will not relieve against the non-performance of a condition precedent to the vesting of an estate, by giving an estate that never vested; it will not vest an estate, that by reason of the non-performance of a condition precedent will not vest in law. This is not a case of forfeiture. No right to the prizes for which the credit is claimed, was ever acquired, to be forfeited.

In determining whether the condition that I have labelled "functional completion"[27] has been met there is

[27] As I have pointed out the use of the term "completed" in the conditions precedent to the becoming effective of the take-out commitment did not convey the intention of the parties that the building be fully and finally complete. I have suggested "functionally completed" since a term has to be employed and it seems to serve as well as any other. A modifier was not supplied by the parties, Ford Credit and the Limited Partnership, and in the absence of one in the agreement that is the one I have selected.

However, "essentially completed," "practically completed" (i.e., completed as a practical matter), "satisfactorily completed," "fundamentally completed," "virtually completed," and no doubt other terms as well could be employed. "Substantially completed" is not uncommonly used. *See Della Ratta, Inc., supra,* 38 Md. App. at 134 *et seq.*, 380 A.2d at 637 *et seq.*; *St. Paul at Chase, supra,* 262 Md. at 233, 278 A.2d at 32 ("It is my judgment, and I so hold, that first this building was 'substantially' completed, and that was all that was required so far as the contract was concerned, . . ."). *Cf. First National State Bank of New Jersey v. Commonwealth Federal Savings and Loan Ass'n of Norristown,* 610 F.2d 164 (3d Cir. 1979).

As an abstract matter "substantially completed" would, in most cases, serve the purpose equally well. However, a practical reason makes the use of "substantially" as the modifier inappropriate in this particular case. The owner, the Limited Partnership, and the Builder chose to use "substantially completed" in their contract, when discussing something evidently different from "completed" for purposes of the take-out commit-

apt to be inherent uncertainty in most cases — a matter of disputed fact probably requiring the intervention of a jury when a jury trial has been requested — as to whether matters not in a state of perfection by the crucial date (here September 2, 1975) sufficed to render the building not "functionally complete." It is the most unusual case — yet this appears to be that case — where a party would expose itself to disastrous consequences by consciously leaving altogether undone steps unambiguously required to be diligently prosecuted at least if it was to meet the condition precedent.

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ment. They used "substantially completed" to govern the rights of the builder to 100% progress payments ("less such retainages as the Architect shall determine for all incomplete Work and unsettled claims.").

However, the very same owner/builder contract, under another section, describes the responsibility of the Builder, who undertook to "perform all the work required by the Contract Documents," in the following terms: "The Work . . . shall be commenced 5 September 1973 and completed 1 February 1975." (Subsequently by agreement changed to September 1, 1975.) Manifestly from the very outset it was the contemplation of both the Limited Partnership and of the Builder that at some point in time the building would be fully, 100% completed with all responsibilities of the Builder fully discharged. The section using the term "completed" is the one in the contract dealing with that subject and "completed" can hardly be interpreted to mean the same thing as "substantially completed" (with retainages for all incomplete work), relating to entitlement to progress payments. It is not a matter at issue, and we may assume, without deciding, that, for like reasons associated with the take-out loan arrangements "completion" for the purposes of the contract between the owner and the builder has also a strong element of practicality, and so may tend toward "functional" completion. However, evidently "completion" as used in the fourth article does not coincide in meaning with "substantial completion" as used in the sixth.

That construction of Article 4 and Article 6 of the agreement between the owner and the builder is reinforced by the consideration that, well before entering the owner/builder contract, the owner hammered out the agreement with Ford Credit, the take-out lender. In the latter agreement, the condition precedent originally called for "completion" by March 1, 1975 (also by mutual agreement extended to September 1,

There may also be cases where, however diligent the owner and builder may have been, however mightily they may have striven, they may simply have been unable to reach a stage which anyone under any definition could describe as "complete." If a whole segment of the building has not been erected at all or has only been roofed in but the floors have not been laid or the plumbing installed, the building is not "complete." *See S & S Building Corp. v. Fidelity Storage Corp.*, 270 Md. 184, 189, 310 A.2d 778, 781 (1973) (". . . to tender a structure as completed when the sprinkler system was deficient would be in about the same category as tendering as complete an office structure or apartment building in which the heating plant had not been installed.").

1975), giving the owner a month's leeway following either full, 100% completion or, in any event, functional completion by the builder, to clean up any matter that might pose a problem insofar as complying with the conditions precedent of the take-out loan were concerned.

There is a further reason why substitution of "substantial completion" as it appears in the owner/builder agreement for "completion" as used in the take-out loan agreement is inappropriate.

Within the same paragraph in which the requirement that the building be "completed" by September 1, 1975 appears in Ford Credit's commitment, the term "completion" is employed in circumstances which it would be altogether contrary to any possible reading to say that only "substantial completion" was intended. "Completion" relates to inspection rights in an architect acting on Ford Credit's behalf to inspect during construction and "after completion." No one could sensibly argue that the right to inspect was tied to "substantial" completion. Inspection was obviously geared to continue until full completion had occurred.

It is an elementary proposition that a word used several times in a document, particularly if the use occurs in the same paragraph, bears a uniform meaning on each occasion of use. *E.g., National Ropes, Inc. v. National Diving Service, Inc.*, 513 F.2d 53, 58 (5th Cir. 1975); *Tennessee Corp. v. Hartford Accident and Indemnity Co.*, 463 F.2d 548, 551-52 (5th Cir. 1972); *Shuford Development Co. v. Chrysler Corp.*, 449 F.2d 429, 436 (5th Cir. 1971).

Since, in the instant case, "substantially completed" had a particular assigned meaning demonstrably different from "com-

Incompleteness of that glaring and evident type is not, however, present here.

What is present, nevertheless, is an undisputed and dispositive fact apparently calling for resolution in favor of one of the parties without the intervention of a jury. As a general rule of interpretation, where the owner or builder has unilaterally taken it upon itself, when operating under an arrangement like the take-out loan commitment from Ford Credit to the Limited Partnership, to decide not to do certain work included in the plans and specifications, that action without the consent of the other party amounts to an incontestable failure to satisfy a condition precedent. If the owner or builder should take it on himself to do so, whatever the reason, and however wise or prudent it may seem to him, absent the consent of the permanent lender the purposeful failure even to attempt to finish a portion of the project inevitably means that functional completion, as

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pleted" as employed in the take-out agreement conditions precedent, it was unnecessarily confusing to the jury to have the judge charge in terms that permitted the Limited Partnership to recover on a showing of "substantial completion." Many of the papers, and much of the testimony, involved use of "substantial completion" for other purposes and to mean other things than "completed" for take-out commitment purposes. *See, e.g.*, Direct examination of Cornelius M. Whalen, J.A. 392; Cross-examination of Robert J. Whalen, J.A. 626; Contract between the Limited Partnership and the Builder, J.A. 2162 *et seq*, at 2175. A conscious purposeful determination not to complete the first floor and penthouse might not have prevented "substantial completion" as the term was employed in this particular case for purposes of ascertaining the amount of progress payments to which the Builder was entitled. Ford Credit concedes as much in its Reply Brief: "Ford Credit does not deny that a properly instructed jury might have rationally found that the Condominium project was substantially complete on September 1, 1975." The determination to leave the first floor and penthouse incomplete did, however, preclude a finding of "completion" as that term was employed in the take-out commitment to establish satisfaction of a condition precedent.

It simply will not do to say that a unilateral decision not even to seek to complete comports with the requirement that all construction shall be "diligently prosecuted to completion."

understood by the parties from the outset, has not been achieved.

In the present case there would seem to be no dispute of fact raising a jury question as to whether a unilateral determination not to finish a portion of the project did in fact occur. The owner indisputably from the record is shown to have taken a decision with respect to which he, for all that appears, did not consult the lender and for which the lender never gave consent nor waived its right to insist on full functional completion.[28] The owner, all on its own, elected to leave the penthouse and first floor unfinished, on the hopes that the opportunities thereby afforded prospective purchasers to have a say in the building décor, would enhance successful disposition.[29]

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[28] Ford Credit, in response to a July 18, 1975 letter from Cornelius Whalen requesting approval of a new apartment layout for the penthouse floor, approved new Release Prices for the penthouse units and stated:

> All other terms of the Commitment remain unchanged, including completion requirements in accordance with previously approved plans and specifications. You are aware that we have not approved changes to plans and specifications, particularly changes relating to the first and top floors.

The Limited Partnership has not adduced evidence that there was any change approved by Ford Credit relieving the Limited Partnership of the explicitly imposed responsibility to complete the first floor and penthouse.

[29] [T]he top floor, in almost every condominium project that I was involved in, are considered prestigious units. And, as such, you can expect to make changes to those particular units. And it usually is much more economical not to do anything to those particular units until the space has been assigned. It's similar to an office building; you would do the shell, and as the tenants moved in you would design his space accordingly around that shell.

. . . .

Q: When you say practice in this building, is that something that Neil Whalen told you he expected to do as a marketing device?

However "reasonable" that may sound, the permanent lender was not obliged to agree. As is so often the case, "reckoning without mine host" may prove a costly mistake. It appears to have done so here.

The owner, the Limited Partnership, adopted the supposed improvement without consulting, much less securing the consent of, Ford Credit. Per its directions, the Builder unquestionably did not accomplish the full functional completion necessary to meet the condition precedent of the take-out loan commitment. Judgment should, therefore, be entered in favor of Ford Credit.[30]

A: I don't believe it was Neil Whalen, but I believe in the rental office (the person involved there) had told me that these floors were to be reserved.
Testimony of Elliott Gitlin.

[30] With the hope that it will illuminate, and not obfuscate, I provide a language aid for understanding "completion" in its several guises:

1) one-star (complete*): The total or 100% completion* which Ford Credit has proposed, but we reject, as the correct test to determine whether, *as between the owner and the take-out lender,* the condition precedent had been met.

2) two-star (complete**): The functional completion**, sufficient, *as between owner and lender,* to satisfy the condition precedent, achieved when the owner has bent every effort to bring about 100% completion*, but trivial, unavoidable matters remain to be done which do not materially interfere with the building's capacity to operate. That, I submit, is what the parties intended when they provided that all buildings had, by September 1, 1975, to be completed** in accordance with plans and specifications.

3) three-star (complete***): The substantial completion*** representing a definition for a purpose quite different from the determination of whether the condition precedent had been met, namely, *as between the owner and the builder,* the attainment of the point in progress payment staging where 100% of the contract price (less, however, holdbacks for all incomplete work) is due and payable.

4) four-star (complete****): Again I deal with usage appearing not in the take-out commitment but *in the owner/builder construction contract,* which calls for completion**** of all the work by September 1, 1975 (originally February 1, 1975).

The Limited Partnership contests that rationale, arguing that the word "substantial" is implicit before "completion" in the contract between it and Ford Credit. It infers that the finishing of the first floor and the

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Since it manifestly was contemplated between the owner and builder that the building would ultimately someday be totally completed* by the builder, the term completed**** has that meaning. However, it is used by the owner and the builder in circumstances and for purposes which modify it in ways not applicable to our problem arising under the understanding between the owner and the take-out lender. In its bilateral contract employment, with time not of the essence (*see Green Manor Corp. v. Tomares*, 266 Md. 472, 473, 295 A.2d 212, 213 (1972) ("In a bilateral contract, time is not of the essence unless specifically made so by the provisions of the agreement.")) the term completion**** reduces the importance of, the precision to be accorded to, the consequences of not meeting, the completion**** date of September 1, 1975. What is of importance is that the usage "completion****" is a variation of the usage "completion*". It is not equivalent to, it connotes more than, "substantially completed***."

The term "substantial completion***" may generate confusion, for it is the term not infrequently employed in building financing and construction documents to mean what I have named "functional completion**." However, the term "substantial completion***" has, in the present case, been preempted in the construction contract between the owner and builder, with whom we here deal, and so cannot be used if I am to preserve precision, to signify "functional" completion** in the option or take-out commitment between the owner and the lender.

It is clear beyond dispute that 100% completion* was not achieved by September 1, 1975. Judge Blair in a pretrial Memorandum and Order stated: "The parties do agree that the building was not fully completed* . . . ." I am also satisfied, after examining the joint appendix, reading the briefs, and listening to oral argument, that 100% completion* is not the test of whether, by September 1, 1975, the condition precedent in the take-out loan commitment had been satisfied.

Just as surely substantial completion***, whether or not it had been achieved by September 1, 1975 (Ford Credit concedes that, properly instructed, the jury could reasonably have determined that there had been substantial completion***) was not the test.

The correct test stands revealed as functional completion**, a sort of golden mean between 100% completion* and substantial

penthouse, which would have cost "only" an estimated $120,250, was not substantial. The contention suggests a difficult snarl, which fortunately we are not called upon to untangle. Only the first floor could be used for commercial purposes. The penthouse could only be developed as single family residences, like the other 25 floors.[31] If the Limited

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completion***. Remarkably there is no dispute over whether functional completion** had been achieved. Elliott Gitlin, the supervising architect retained by the Limited Partnership and answerable to it certified: "That [the project] is substantially completed [either ** or ***] with the exception of the penthouse and plaza levels."

Di Blasio and VanBuren, architects for Equibank and Ford Credit, agreed:

> It is our opinion that as of this date [August 23, 1975] the project is complete, [either ** or ***] substantially in accordance with the Plans and Specifications reviewed by this office, excepting and excluding certain areas which are subject to tenant improvements.

Cornelius M. Whalen, the sole general partner of the Limited Partnership also was persuaded that there would not, and could not be "functional" completion** of the first floor and penthouse. He wrote Ford Credit:

> we cannot have all units completed[**] prior to settlement. Further, if you demand they be finished I would not know how to comply.

Cornelius M. Whalen devoted his energy to structuring arguments as to why two floors (the first floor and penthouse) out of 27 were not part of the building in the face of the take-out loan commitment's language that all buildings are to be completed** in accordance with plans and specifications.

The Limited Partnership has advanced no satisfactory argument to substantiate that position, which flies in the face of meanings customarily assigned to words. Where the parties intend a departure, even as extraordinary as making "black" mean "white" they, of course, may so contract, if they mutually agree. Where the case of the Limited Partnership is deficient is in its failure to show that Ford Credit ever agreed to the removal of two floors from the take-out loan commitment's language.

[31] *See, e.g.*, a memo from Cornelius M. Whalen to the project manager which stated, *inter alia:*

> THE PENTHOUSE UNITS ARE GOING TO BE FINISHED IN THREE LARGE PENTHOUSES TAKING

Partnership was free to leave one floor unfinished, merely "roughed-in," to gratify the wishes of prospective occupants, without thereby jeopardizing the availability of the take-out money, why not all the other floors as well?" The Limited Partnership may be expected to contend that only the penthouse was to be developed in luxury apartments. However, one searches the documents in vain for an indication that as to "completion* *," a different test applied for luxury apartments than for other "normal" apartments.

The Limited Partnership, still pursuing the incorrect assumption that substantial completion * * * is the test, then points to evidence which Ford Credit itself agrees would have permitted a finding of "substantial completion * * *" by September 1, 1975. However, to the extent, if any, that "substantial completion * * *" is relevant, it concerns the question whether the owner and builder, *assuming they have striven to get everything ready by the crucial date,* still have had to leave some things, relatively minor in amount, for future attention and completion * * *, not amounting to enough to interrupt or prevent "functional completion * *." The usage "substantial completion* * *" can, however, have no significance with respect to circumstances where the owner has taken it on itself unilaterally to revise the agreement by excluding parts of the project (here the first floor and penthouse) from the requirement that they make every effort to

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UP THE AREA OF TWO 2-BEDROOM UNITS EACH. THE UNITS IN THE VERTEX OF THE Y WILL REMAIN TYPICAL.

[11] *See, e.g.*, the testimony of Robert J. Whalen:

Q Mr. Whalen, were there not customizing being done by every tenant that was coming into that building?

A Virtually every tenant, yes, to some extent.

Q And to the extent that a tenant provides for customizing on any floor (and any unit) and it costs more the tenant pays for it?

A To the extent that it costs more, as far as the owner is concerned.

achieve "completion* *" by the date as of which the condition precedent must be satisfied.

So to recapitulate, the parties agreed to "functional completion* *", diligently prosecuted, by September 1, 1975 as a condition precedent to the loan. The condition simply was not met because the owner and builder had not striven to complete* * the first floor and penthouse. Instead, they had flatly determined to leave them incomplete until they had been sold to permit the purchasers to select their own finishings. That may have been wise viewed from some perspectives. However, the fact that it was a good idea from the owner's vantage point did not render it in conformity with the conditions precedent. On the contrary, the lender was entitled under the take-out commitment to full efforts to attempt completion*. The take-out loan terms simply did not allow the owner all on its own to discontinue such efforts with respect to any part of the project absent a consent, in effect an amendment to the commitment, permitting such an alteration. The evidence is unambiguous that no such amendment was sought or given.

Perhaps perceiving the problems associated with its decision, all on its own, to leave unfinished the first floor and penthouse, the Limited Partnership argues that it was justified by custom and practice. But that requires the

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Similarly, Elliott Gitlin testified as follows:

> Q Do you recall doing some design specifications for tenants on other floors, also?
>
> A Yes. I believe I had done one on the 16th floor or the 15th floor (I think one on the 8th floor as well) where tenants wanted to take — there was one case, I think on the 16th floor, a brother and sister wished to take three apartments and convert it into two; that was in the confines of demising walls.
>
> Q So that I gather you agree that it is not unusual to have tenants make improvements and make selections?
>
> A Selections, obviously is something — again, this is nothing but a vertical house; and as such the tenants will be making selections of customizing their particular units.
>
> * * * * * *

words calling for all the buildings and improvements to be "diligently prosecuted to completion**" "in accordance with plans and specifications therefor" to be read as meaning the exact opposite, to say "need *not* be completed**." *Morris v. Ehlers*, 211 Md. 23, 29, 124 A.2d 776, 780 (1956):

> Perhaps the leading case in Maryland on the subject is *Applestein v. Royal Realty Corp.*, 181 Md. 171, 28 A.2d 830, which succinctly states the rule (at 181 Md. 173, 28 A.2d 831): "The true test is that there must be in the contract something doubtful which can be explained by a usage or custom. If the contract is plain, evidence cannot be received to contradict it. If the contract is made with reference to a usage and therefore omits the special particulars which are supplied by that usage, those particulars can be supplied by proof of the usage." For a general discussion of the matter, see also *Williston, Contracts*, Rev. Ed., Vol. 3, Sections 607-609, and *Restatement, Contracts*, 247.
>
> We think that in the present case the testimony as to custom, if given effect, would not explain but would directly contradict a term of the contract and that it therefore cannot be given effect.

See also Busby v. North America Life Insurance Co., 40 Md. 572, 579-80 (1874); *Foley v. Mason*, 6 Md. 37, 49-50 (1854).

With commendable determination, if rather little in substance, the Limited Partnership makes a further contention — difficult to understand and even more difficult to accept. It contends that, because a long period of time elasped after the execution by it and Ford Credit of the take-out commitment without anything being said about the need for completion** of the first floor and penthouse, it apparently having first come up in correspondence between Ford Credit and the Limited Partnership only in July of 1975, and because Ford Credit's inspectors saw the incomplete state of the first floor and penthouse and said nothing, some sort of waiver or

estoppel occurred. However, there is no clear evidence that Ford Credit was even aware that a decision had been taken by the Limited Partnership deliberately not to complete** the first floor and the penthouse prior to July. When it was brought up, Ford Credit promptly made unequivocally clear its expectation that the terms of the commitment would be met, particularly those calling for completion**.

In all events, the obligation to complete** the first floor and penthouse was indisputably assigned to the Limited Partnership, not to Ford Credit. It is not a rule of option contract law that, absent any undertaking to do so, one party must monitor performance by another party on whom the undertaking unmistakably has been imposed. *Garbis v. Apatoff*, 192 Md. 12, 19, 63 A.2d 307, 310 (1949):

> Plaintiff also contends that, even if his work was not satisfactory, defendants saw its progress and made no objection to it, and their silence should be held as an acceptance of the work and a waiver of any defects. We cannot accept this contention. . . . Nor is the failure of an owner to take charge of the prosecution of the work, when he finds that the contractor is not complying strictly with the conditions of the contract, a waiver of his right to damages for defective work. In the instant case there is no basis for the contention that defendants waived any defects in plaintiff's work.

The take-out commitment has nowhere any language suggesting that Ford Credit had a responsibility to remind the Limited Partnership of its clearly spelled-out obligation to satisfy the conditions precedent, under penalty of losing the right to insist on compliance with the loan undertaking unless it did so.

With fervor, yet altogether lacking in authority to support it, the Limited Partnership has argued that the specification of September 1, 1975 was the establishment of only an approximate date since time was not of the essence. But time was of the essence, since a price had

been paid for Ford Credit to hold the take-out commitment open until September 1, 1975. To be required to extend for a reasonable time beyond September 1, 1975 with no provision for an additional fee for the additional time would contradict the very concept of an option to borrow money. *See* 1 *Corbin on Contracts* § 35 ("If one pays five hundred dollars for a thirty day option to buy land for twenty thousand dollars, the power to accept for thirty days is the exact agreed equivalent of five hundred dollars. An extension of the power, even for a moment of time, by action of a court, is compelling the offeror to give something for nothing.").

The Limited Partnership has argued that the motivation of Ford Credit was attributable not to dissatisfaction with the incomplete state of the first floor and penthouse, but rather to disenchantment with the loan in a changed and unhappy building market. But the argument totally misses the point. The district court quite properly determined that motivation was not an issue, the sole question being whether or not the project was "completed**" on September 1, 1975 as the parties contemplated. In this the district judge was clearly correct. *See Owens v. Graetzel*, 149 Md. 689, 697, 132 A. 265, 268 (1926):

> If the appellant was in default, the appellee had the right to foreclose expressly and plainly given him by the terms of his mortgage. In the assertion of this contractual right, his motive was immaterial, although it were sinister and malicious, because a sinister and malicious motive does not make an act wrongful so long as the act is within the party's legal rights.

Cf. Jersey Boulevard Corp. v. Lerner Stores Corp., 168 Md. 532, 540, 178 A. 707, 710 (1935) ("This would be true though evasion of the future obligation to the landlord furnished the principal motive for the bankruptcy; that specific purpose would not affect the exercise of the clear

legal right."); *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 567, 69 A. 405, 409 (1908).[23]

The efforts to criticize Ford Credit for being dissatisfied with having to go through with the project and for seeking ways not to do so if legally it was not under a contractual obligation are unrealistic. There is nothing to demonstrate that, had the owner endeavored to the end fully to complete** Ford Credit would not, however unappetizing the project might have become, have gone through with it,

[23] The Limited Partnership has made no such assertion, but possibly someone might suggest an incongruity in my conclusions:

a) on the one hand that, in refusing to make the take-out loan because a condition precedent was not met, Ford Credit could act with the most malicious of motives, so long as it stayed within its legal rights; and

b) on the other hand that, in claiming a completed** building by September 1, 1975, the Limited Partnership should be penalized for its decision never even to seek completion* of the first floor and penthouse, whereas it might not have been so penalized, had it bent every reasonable good faith effort to achieve completion* of the building, but was frustrated by factors beyond its control with the result that the state of incompletion was substantially the same. But there is no real incongruity. In both cases, it is a matter of the contractual undertaking by which conduct is measured. In one case, irrespective of motive, Ford Credit was bound to make the loan if completion** was achieved, and not so bound if it was not. All the good faith in the world on the part of Ford Credit would not have excused a failure to produce the loan funds, when demanded by the Limited Partnership, if the building had been completed** by September 2, 1975. In the other case, the undertaking of the Limited Partnership required it to use good faith *efforts* to achieve completion*, if it were to satisfy the condition precedent of completion**. The record is clear that *no* such efforts were made by the Limited Partnership on the first floor and in the penthouse.

Similarly, in another market climate, where money was readily available from a number of sources, for the kind of loan the Limited Partnership wanted, the Limited Partnership, in the most malicious way, could legally have taken its loan business elsewhere, although the spiting of Ford Credit was a major motivation. The reason: because it would be acting within its legal rights in doing so.

complying with its contractual obligations.[34] The Limited Partnership gave Ford Credit a legitimate opportunity to say that the loan would not be made because a condition precedent clearly had not been met. The Limited Partnership having been the first to break the agreement, or, more precisely, the one who deliberately elected not to comply with a condition precedent, is not in a position, therefore, to complain that, although it had not done what it was obliged to do, it should nevertheless have been entitled to the loan, however unpalatable it had become.

Market conditions inevitably change from time to time. No doubt there was a period in American business affairs when the loan from the lender's point of view would still have been so favorable that, confronted with a situation in which a condition precedent had not been met, the lender might, nevertheless, have chosen to waive the noncompletion and go ahead with the project. Because other lenders had done so in other cases, or even because Ford Credit itself had chosen to do so, in another case or in other cases, did not mean that there was no condition precedent. Rather, it meant only that the lender had, in *other*

[34] The fact that the loan had become unpalatable was not Ford Credit's doing. It did not control the market forces; if it did, they doubtless would have remained favorable. Nor is it realistic to expect that the gimlet eyes of a hardheaded lender would overlook that the loan had become, in the interval between February 14, 1973 and September 1, 1975, unappetizing. That also was a fact, not a contrivance by a lender, however mean-minded and hard-hearted it may have been.

The Limited Partnership never permitted the situation to develop to a point where Ford Credit might have elected a cold-blooded breach of contract. Before that stage was ever reached, the Limited Partnership relieved Ford Credit of any obligation to make the take-out loan by deciding, all on its own, not to complete**, not even to prosecute diligently to completion*, part of the project. It simply expects too much from human nature to insist that Ford Credit, provided a perfectly legal escape from a now unpropossessing contract, should refrain from using it, or that Ford Credit behaved badly in not refraining. It was the Limited Partnership, not *Ford Credit*, which brought the unhappy consequences on the Limited Partnership.

situations, elected not to enforce the condition precedent. That in no way prevented the prospective lender, when the business climate had altered, from choosing to rely on the failure to comply with the condition precedent and not go through with the loan. It was fully within the power of the Limited Partnership to strive to complete** the building. It did not do so. It failed therefore to satisfy the condition precedent.

We have no occasion to consider whether, had a *bona fide* full effort to complete** been made, the degree of incompletion existing in the case of this particular project would or would not have been sufficient to make the description of "functionally complete**" appropriate or inappropriate. That may, assuming full efforts had been made to complete** the first floor and penthouse, as well as the remainder of the building, well have been a jury question. However, the knowing intentional determination not to try to complete** foreclosed the Limited Partnership and should require the entry of judgment as a matter of law in favor of Ford Credit.

III.

Finally, I perceive great difficulties in the affirmance of Judge Blair's ruling, which, though without opinion, was in effect a summary judgment, holding as a matter of law that the Limited Partnership retained an interest entitling it to sue, despite an assignment of its interests absolute on its face. It is not disputed by the majority that such an absolute assignment operates in accordance with its terms, unless a party attacking it produces evidence to show that it, in fact, served an alternate, lesser purpose, such as providing collateral security. The Limited Partnership produced such evidence, but it was controverted by Ford Credit. There was, consequently, a straightforward jury question, and the majority erred in upholding the arrogation by the judge to himself of a decision properly lying in the province of the jury.

However, I do not elaborate my reasons simply because the other two principal points (the right to a trial *de novo*,

and the right to a directed verdict because of the absence of efforts diligently to prosecute to completion) transcend the question and render it of secondary importance.

Similarly, doubts I have as to the correctness of the disposition in the majority opinion of damage issues need not be elaborated. They should, in my view, never have been reached, for the defendant should have prevailed entirely on liability, and was entitled to a directed verdict at the close of the evidence.

In The United States District Court
for the District of Maryland

Civil No. HM75-1792

Cornelius M. Whalen, et al.

v.

Ford Motor Credit Company

MEMORANDUM AND ORDER

After the tragic and untimely death on April 20, 1980 of the Honorable C. Stanley Blair, who had been presiding over the trial of this case before a jury, defendant Ford Motor Credit Company (Ford) moved for a mistrial. At the conclusion of a hearing on the motion on April 29, the undersigned judge, to whom the case had been reassigned on April 25, indicated to the parties that the motion would tentatively be denied. The purpose of this Memorandum and Order is to set forth briefly the reasons for that ruling.

Ford urges several grounds in support of its motion:

(1) to require Ford to proceed would deny it the right to a jury trial as guaranteed by the United States Constitution;

(2) the law does not permit the substitution of a judge, in the absence of consent, during the course of a federal civil jury trial before a verdict has been rendered;

(3) the complexities of the issues, facts, and legal theories, combined with the fact that three of the possible five weeks of this trial had been concluded under Judge Blair, make it impossible for a judge to "step in" and be able to rule on the relevancy of evidence, to implement existing motions in limine and trial rulings, to decide post-trial motions, and to instruct the jury; and

(4) the hiatus in the trial will be too great to preserve the continuity of the proceedings and Ford will be prejudiced as a result.

With respect to its first and second arguments, Ford asserts that the right to trial by jury is a right to a trial before one jury *and one judge* — at least until a verdict has been reached.

According to this argument, the judge-jury "unit" cannot be altered in any respect without the consent of all parties. The court recognizes that little case or statutory authority exists in this area but believes that what does exist, for the most part, does not support Ford's contention that the court has no power to resume the trial in this case at the point where it was continued on April 17, 1980. For example, in *Patton v. United States*, 281 U.S. 276 (1930), a criminal case, the Supreme Court noted that the right to trial by jury includes the right to trial by a jury in the presence and under the superintendence of a judge. *Id.* at 289 (quoting *Capital Traction v. Hof*, 174 U.S. 1, 13-14 (1899)). However, the Court gave no indication that the *same* judge must sit throughout the entire trial.

Although the instant case is civil and not criminal, it is instructive to consider the provisions of Rule 25 of the Federal Rules of Criminal Procedure:

> *Rule 25. Judge; Disability*
>
> (a) During Trial. If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial.
>
> (b) After Verdict or Finding of Guilt. If by reason of absence, death, sickness or other disability, the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly

> sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

Although the Federal Rules of Civil Procedure contain a provision (Rule 63) virtually identical to criminal Rule 25(b), there is no civil equivalent of Rule 25(a). It is uncertain why no civil counterpart to Rule 25(a) was adopted. The court has discovered no evidence that such a counterpart was ever considered by the Civil Rules Committee in 1966, when Rule 25(a) was adopted, or at any other time. However, it seems inconceivable to the court that if a district judge, because of death, sickness, or other disability, may be replaced during the course of a criminal trial, such a replacement would be impermissible in civil trials which involve less stringent procedural safeguards.

Ford points out that at least one recognized treatise has questioned the constitutionality of applying Rule 25(a) absent the consent of the defendant, 2 Wright & Miller, *Federal Practice and Procedure* § 392, but that treatise presents no clear analysis of *why* the Rule might be unconstitutional. Similarly, Ford has made no attempt to do so. *See also Bailey v. State*, 397 N.E.2d 1024, 1027 (Ind. App. 1979). The court notes that, although it did not specifically address the issue, the A.B.A. Project on Minimum Standards for Criminal Justice, in its *Standards Relating to Trial by Jury* (1968), approved a standard based on Rule 25(a). The A.B.A. Project stated, *id.* at 100-01:

> In contrast to some state provisions on substitution during trial, the standard follows the federal approach of permitting substitution only in cases of jury trial. Where the judge is also the trier of facts, the same judge should hear all the witnesses, unless the parties consent to substitution.

> Of course it may be contended that it is desirable for the judge to have heard all the witnesses in a jury trial as well, so that he may properly charge the jury, rule on motions (such as for a directed verdict or for a new trial), and the like. The Advisory Committee shares the view taken by the federal Advisory Committee on Criminal Rules that these functions may be adequately performed if the judge has familiarized himself with the trial record.

Clearly, replacement of a judge during the course of a non-jury trial, as in *Arrow-Hart, Inc. v. Philip Carey Co.*, 552 F.2d 711 (6th Cir. 1977) and other cases cited by Ford, raises more serious due process issues than if such replacement occurs during a jury trial. The reason is that in a nonjury case, the judge is judge of facts as well as of law, while in a jury trial, his role is more limited in that the jury, not the judge, must find the facts. If the same jury serves throughout the trial, no injustice would appear to result in most cases merely from the fact that during the trial, the original judge because of necessity is replaced by another judge who has familiarized himself with the record and who is thus able to properly guide the trial to its conclusion.

Defendant relies upon several nonjury civil cases in which the respective courts held that a new trial was required when the original judge died before making findings of fact and conclusions of law. *See Arrow-Hart, Inc. v. Philip Carey Co.*, 552 F.2d 711 (6th Cir. 1977); *Brennan v. Grisso*, 198 F.2d 532 (D.C. Cir. 1952); *Ten-O-Win Amusement Co. v. Casino Theatre*, 2 F.R.D. 242 (N.D. Cal. 1942). *See also Burrill v. Shaughnessy*, 9 Fed. R. Serv. 918 (N.D.N.Y. 1946). These cases rely upon Rule 63 of the Federal Rules of Civil Procedure which, as already mentioned, is virtually the same as Rule 25(b) of the Federal Rules of Criminal Procedure:

> *Rule 63. Disability of a Judge*
>
> If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable

> to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

The Sixth Circuit in *Arrow-Hart* affirmed the trial judge's construction of Rule 63. The judge had stated that "[s]ince Rule 63 specifies that a new Judge may act where the previous Judge had already made findings of fact and conclusions of law, it follows that if the prior Judge had not made those findings and conclusions, then a new trial is required." 552 F.2d at 712.

Ford argues that because Rule 63 applies "after a verdict is returned [in a jury case] or findings of fact and conclusions of law are filed [in a nonjury case]," the *Arrow-Hart* logic should apply in the instant case to require a new trial — because a verdict has not been returned. To the extent that the *Arrow-Hart* reasoning would apply to the instant jury case, the court declines to follow *Arrow-Hart*. As already indicated, the court is of the view that if substitution of a judge in mid-trial in a criminal jury case is permissible under certain circumstances, an interpretation of Rule 63 that precluded such substitution under the same circumstances in a civil jury trial would be illogical and unwarranted.

Ford's third argument — that the complexities of the case preclude a judge from "stepping in" in the middle of trial — is one that the court is in the process of assessing. At the hearing on the motion for mistrial, the court indicated that the motion would be finally denied if, after a review of the record and court files, the court felt familiar enough with all aspects of the case to go forward. The court has informed counsel and the members of the

jury that unless further notice is given, the trial will resume on Thursday, May 8, 1980 at 10:00 a.m. Accordingly, the court has been reviewing the record and various other papers in the case, and, at this time, has not encountered any insurmountable complexities.

Defendant argues that the "most impossible task" will be for the court to rule on any post-trial motions that may be filed. However, the court believes that such a task will not be overly burdensome. *See Connelly v. United States*, 249 F.2d 576, 579-81 (8th Cir. 1957); *Cahill v. Mayflower Bus Lines, Inc.*, 77 F.2d 838, 839-40 (2d Cir.), *cert. denied*, 296 U.S. 629 (1935). Rule 63, on which Ford itself relies, specifically contemplates that a replacement judge, even one who has heard none of the evidence in the trial, may properly rule on post-trial motions.

Finally, Ford contends that the hiatus in the trial will inevitably prejudice one side or the other. As presently scheduled, the trial will resume 21 days after it was continued. The court believes that because some of the jurors apparently took notes during the first three weeks of trial and because counsel, in their arguments to the jury, may refresh the recollection of the jurors, the hiatus is not so great as to unduly prejudice either side.

The court believes that if possible this trial should go forward as scheduled on May 8, 1980. To do otherwise would result in a substantial waste of the court's and court personnel's resources and time, as well as those of the parties, the jurors, and counsel.

For the foregoing reasons, it is this 2nd day of May 1980, by the United States District Court for the District of Maryland,

ORDERED:

(1) that the motion for mistrial of defendant be, and th
same hereby is, *Denied;* and

(2) that the Clerk of the Court mail copies of thi
Memorandum and Order to the parties.

HERBERT L. MURRAY,
United States District Judge.